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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-98-29-PT

IN THE TRIAL CHAMBER

Before: Judge A. Simôes Rodrigues, Presiding
Judge F.A. Riad
Judge P. Wald

Registrar: Mr. Hans Holthuis

Date Filed: 23 October 2001

THE PROSECUTOR

v.

STANISLAV GALIĆ

PROSECUTOR'S PRE-TRIAL BRIEF PURSUANT TO
RULE 65 *ter* (E) (i)

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PROSECUTOR'S PRE-TRIAL BRIEF

Pursuant to Rule 65*ter* (E)(i) of the Rules of Procedure and Evidence ("Rules") and the Trial Chamber's Scheduling Order of 5 October 2001, the Prosecution submits this Pre-trial Brief which sets forth the Prosecution's case and addresses the relevant factual and legal issues.

I. FACTUAL ALLEGATIONS

I. INTRODUCTION

1. At all material times, namely September 1992 to August 1994 (hereinafter referred to as "the indictment period"), an armed conflict existed in Sarajevo. It formed part of a broader armed conflict which, as this Tribunal has established, occurred in Bosnia and Herzegovina at least during the same period.[1]

2. The principal combatants in and around Sarajevo were the Army of the *Republika Srpska* or *Vojska Republika Srpska* (hereinafter referred to as "the VRS"), and the *Armija Bosna i Herzegovina*, being the forces of the government of Bosnia and Herzegovina (hereinafter referred to as "the ABiH"). In the Sarajevan theatre, the particular VRS forces involved were the *Sarajevsko – Romanijski Korpus,* or *Sarajevo Romanija Corps* (hereinafter referred to as

[1] The Trial Chamber has previously noted, for instance, that in 1990, following the first multi-party elections in post-World War II Yugoslavia in each of the Republics, strongly nationalist parties were elected, heralding the break-up of the federation and opening the way to attempts by Croatia and Serbia to expand their territories (see *Prosecutor v. Duško Tadić,* Judgement, 7 May 1997 (hereinafter *Tadić* Judgement), para. 68). After Croatia declared independence, a war ensued between the JNA and the Croatian Serbs on one side and the Croatian government forces on the other (*ibid,* para. 112). The conflict between Serbia and Croatia played a significant part in the division of Bosnia and Herzegovina along ethnic lines, paving the way for all the events that were to occur later (*ibid,* para. 122).

"the SRK"). Forces of the Bosnian Croat Defence Council (hereinafter referred to as "the HVO") were also present in Sarajevo until late 1993 and fought alongside the ABiH forces.[2]

3. The indictment period is coextensive with the period during which Major-General Stanislav GALIĆ (hereinafter referred to as "the Accused") was the Commander of the SRK. During that period, the SRK launched attacks against legitimate military objectives within the environs of Sarajevo. These attacks are irrelevant to the charges against the Accused, even where such attacks may have resulted in proportionate or incidental civilian casualties, or fear.

4. However, during the indictment period, the civilian population of Sarajevo was, contrary to the principle of distinction, subjected by forces under the Accused's command and/or control to an unlawful campaign of violence and terror, principally in the form of the sniping[3] and shelling[4] of civilians, either deliberately or as the result of indiscriminate fire. Consequently, thousands of civilians were killed or injured, and the city's population was generally subjected to severe psychological trauma, resulting principally from the awareness that nowhere in the city was safe for themselves or for their families and friends, regardless of gender or age.

II. BACKGROUND

5. The Prosecution refers to and relies upon the section of the Indictment entitled "background."

Immediate Pre-Indictment History of the Conflict in Sarajevo

6. Following moves towards independence by Slovenia and Croatia in 1991, the government of Bosnia and Herzegovina called a referendum as to whether it should also declare independence. However, Bosnian Serb political leaders were opposed to an independent state and called on their respective communities to boycott the referendum. On 9 January 1992 the Bosnian Serb political leadership proclaimed a Serbian Republic of Bosnia and Herzegovina; the *Republika Srpska*. By early March 1992, barricades and checkpoints were erected in and around Sarajevo.[5]

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[2] In late 1993, the HVO troops in Sarajevo were disarmed and disbanded by the ABiH for fear that the HVO would turn against them, as had happened in central and southern Bosnia.
[3] The term "sniping" for the purposes of this Brief refers to fire from a small calibre weapon, such as a rifle or machine-gun, from a concealed, or partially concealed, position.
[4] The term "shelling" for the purposes of this Brief refers to attacks by heavy calibre weapons, including mortars, guns, howitzers, missiles and tanks.
[5] In March 1992, Bosnia and Herzegovina declared its independence following a referendum held in February 1992 sponsored by the Bosnian Muslims with some support from Bosnian Croats (*Tadić* Judgement, para. 78). The holding of the February referendum was opposed by Bosnian Serbs, who largely abstained from voting (*idem*). With the disintegration of multi-ethnic federal Yugoslavia, the prospect of war in Bosnia and Herzegovina increased. Both Bosnian Serbs and Croats

7. International recognition of the Republic of Bosnia and Herzegovina took place on 6 April 1992. Leading up to that date, the *Jugoslavenski Narodna Armija* or Yugoslav People's Army (hereinafter referred to as "the JNA") (being primarily elements of the 4th Corps, 2nd Military District of the JNA), deployed artillery in locations overlooking, or in range of, the city and conducted increased military exercises. On or about that date, the city was heavily bombarded by artillery, tanks and mortars from these positions. Thereafter sniping activity commenced, as set out in the section entitled "Factual Basis of the Charges against the Accused," below.

8. The city centre was attacked in May 1992. On 12 May 1992, the Assembly of the *Republika Srpska* announced that a strategic objective of this attack was to divide the city into Serb and Muslim parts.

The JNA/VRS Forces and the SRK

9. On or around 20 May 1992, JNA forces withdrew from Bosnia-Herzegovina. The 2nd Military District of the JNA became the nucleus of the Bosnian Serb Army, which was reconstituted firstly as the Army of the Serbian Republic of Bosnia-Herzegovina and subsequently as the VRS.[6]

10. The SRK traces its history back to the former JNA 4th Corps, garrisoned in and around the environs of Sarajevo. Throughout the indictment period, the SRK enjoyed a significant advantage over the ABiH in terms of the size of its arsenal of mortars, artillery pieces and tanks. The SRK comprised at least 18,000 troops, but was at a disadvantage to the ABiH in terms of troop numbers.

11. Following the failure of the Bosnian Serb forces to divide Sarajevo in May 1992, confrontation lines were established, which constituted a virtual encirclement of Sarajevo. These remained relatively static into and throughout the indictment period. Consequently, the armed conflict in Sarajevo has sometimes been characterised as a "siege." It is unnecessary to determine whether this description is accurate, whether factually or legally. Rather, the relevant question is whether the requirements of international humanitarian law that are

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made it apparent that they would have recourse to armed conflict rather than accept minority membership of a Muslim-dominated State (*ibid,* para. 83).

[6] This Tribunal has already adjudicated background facts relating to the withdrawal from Bosnia and Herzegovina of the Yugoslav JNA forces. For instance, it has established that in reality, much weaponry and *materiel* was left in the hands of its Bosnian Serb membership, who subsequently reorganised themselves. Despite this formal withdrawal, VRS forces were staffed with troops and commanders from the JNA (*Tadić* Judgement, para. 115)), equipped with heavy JNA weaponry, tanks and armoured personnel carriers (*ibid,* para. 114) and that the VRS continued to receive assistance from Serbia following this withdrawal (*ibid,* para. 115)).

applicable to all situations of armed conflict were fulfilled by the Accused during his tenure as Corps Commander.

iii. FACTUAL BASIS FOR THE CHARGES

12. The Accused is criminally responsible for the specific incidents of sniping and shelling which are set forth in the two schedules to the Indictment (hereinafter referred to as "the scheduled incidents"). They are illustrative of a broader campaign of sniping and shelling which was wilfully directed against the civilian population of Sarajevo during the indictment period. As such, the attacks:

a) were directed at the civilian population specifically, whether aimed at particular civilians or fired into civilian areas indiscriminately; and/or
b) were directed at military objects and civilians without distinction; and/or
c) caused civilian losses which were disproportionate to any military advantage anticipated.

13. In addition to the scheduled incidents, evidence will also be led at trial of other similar incidents which formed part of the unlawful campaign of sniping and shelling and terror for which the Accused is also criminally responsible.[7]

14. The total number of civilian casualties occasioned during the indictment period as a result of this campaign is unknown. Investigations by local authorities at the time were often precluded by the lack of physical security and other constraints imposed by wartime conditions. Nevertheless, based on the records that are available, the number well exceeded one thousand. The serious extent of civilian casualties as a result of the targeting noted above is supported by United Nations personnel, representatives of the population itself, the records of hospitals where victims were treated and municipal records pertaining to deaths which occurred during the conflict. While the majority of victims were Muslim, the casualties included Serbs and Croats who had refused to leave Sarajevo.

Sniping Incidents

15. The natural and urban topography of Sarajevo (such as ridges and high-rise buildings on the SRK side of the confrontation line) provided ideal vantage-points for the snipers, from which they selected and targeted victims in the city and its suburbs. Particular parts of the city

[7] The Prosecution will adduce evidence of these further incidents *via* witnesses to the specific incidents, general witnesses providing an overview of the indictment period and from United Nations military personnel and official situation reports which are trial exhibits. Notice of the particulars of such further incidents are communicated in the Rule 65 *ter* witness summaries and are contained in statements and other documents disclosed to the Defence.

became known "hot spots," posing an extreme risk to civilians trying to move around, and certain locations became well-known as "sniper nests." Civilians, over time, became adept at identifying and avoiding well-known sites of sniper activity. Due to the lack of fuel and food and other privations, civilians were nevertheless often forced to leave their dwellings so as to seek the necessities of life, thus rendering them even more vulnerable to sniping.

16. The scheduled sniping incidents describe the targeting of persons who were at the relevant time engaged in activities which could not have led any reasonable commander or soldier to have assumed that they were combatants. Those targeted included civilians tending vegetable plots,[8] transporting water,[9] riding on bicycles,[10] buses or trams,[11] gathering wood for fuel,[12] clearing rubbish,[13] shopping[14] or simply walking with their children, friends or family.[15] Among the victims of the scheduled incidents are children who were playing[16] and civilians who were attacked within the sanctity of their own homes, whilst drinking coffee, sitting with family, watching television or at prayer.[17]

17. Other victims of sniping, not listed in the scheduled incidents, include civil defence workers and other civilian authorities, such as ambulance workers seeking to transport the injured, workers seeking to repair infrastructure and utilities and fire fighters attending fires. Civilians were subjected to sniping whilst assisting other civilian victims, convalescing in hospital or burying their dead.

18. The type of clothing worn by the victims, their physical attributes, or the type of activities in which they were engaged at the time they were killed or injured clearly identified them, *prima facie* at least, as civilians.

Shelling Incidents

19. The location and timing of shelling attacks indicates that shells were launched in such places and at such times as to predictably cause extensive civilian casualties, or in the case of indiscriminate fire, with disregard for the possibility that substantial harm to civilians was likely to ensue. Examples include the shelling (or mortaring) during business hours of the area

[8] See scheduled (sniping) incident 4.
[9] See scheduled (sniping) incidents 6, 9, 16 and 17.
[10] See scheduled (sniping) incident 18.
[11] See scheduled (sniping) incidents 22 and 24.
[12] See scheduled (sniping) incidents 8 and 11.
[13] See scheduled (sniping) incident 15.
[14] See scheduled (sniping) incident 27.
[15] See scheduled (sniping) incidents 5, 10, 21, 23 and 25.
[16] See scheduled (sniping) incident 3.

in which Markale market was located,[18] a football match being held on a residential car park on a Muslim holiday,[19] a humanitarian aid distribution point and children's religious classes.[20]

20. Areas in which civilians would be expected to be found and which were not used for any military purpose during the indictment period - such as water lines, hospitals, playgrounds, primary or elementary schools, funeral homes and cemeteries - were shelled during the indictment period.

21. As with sniping attacks, the shelling incidents often took place during lulls in military activity. If anything, however, the risks posed by shelling were even more omnipresent than those posed by sniping, as it was impossible to predict where or when one might fall victim to shelling or to take measures to limit these risks, such as, for example by avoiding well-known sniper "hot spots."

The Infliction of Terror

22. The principal objective of the campaign of sniping and shelling of civilians was to terrorize the civilian population.

23. The intention to spread terror is evident, *inter alia,* from the widespread nature of civilian activities targeted, the manner in which the unlawful attacks were carried out, and the timing and the duration of the unlawful acts and threats of violence, which consisted of shelling and sniping.

24. The nature of the civilian activities targeted demonstrates that the attacks were designed to strike at the heart, and be maximally disruptive, of civilian life. By attacking when civilians were most vulnerable, such as when seeking the necessities of life, visiting friends or relatives, engaging in burial rites or private prayer, or attending rare recreational events aimed precisely at countering the growing social malaise, the attacks were intended to break the nerve of the population and to achieve the breakdown of the social fabric.

25. As an element of the offence of terror, it is unnecessary for the Prosecution to establish the *motive* for which terror was inflicted. It must merely be established that terror was in fact caused, and that it was inflicted wilfully.[21]

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[17] See scheduled (sniping) incidents 7, 20 and 26.
[18] See scheduled (shelling) incident 5.
[19] See scheduled (shelling) incident 1.
[20] See Scheduled (shelling) incident 4.

26. The attacks were carried out in a manner that made them incapable of prediction by the civilian population, rendering self-protection virtually impossible and the sense of vulnerability acute. Attacks could potentially have struck any civilian, regardless of age or gender, at any moment. Often, they were carried out during quiet periods and cease-fires, which was calculated to, and did in fact, lull the population into a false sense of security and spread maximum fear.

27. An inevitable and calculated consequence of the attack was thus that the civilians of Sarajevo were aware that any one of them, regardless of age or gender, could potentially become a victim, at any moment.

28. The population suffered serious mental suffering and/or psychological trauma as a result of the unlawful campaign of shelling and sniping. Direct evidence of the mental state of the civilian witnesses – both of those who were either direct victims of attacks and those who were not – will demonstrate the psychological impact of the sniping and shelling attacks.

29. Measures adopted by the civilian population for their own survival are illustrative both of the characteristics of the sniping and shelling campaign and its impact on the civilian population. These include seeking refuge in their homes, including basements and cellars, for extended periods of time, and the construction and use of visual barriers, such as blankets over windows or between houses. Outdoor activities were often limited to hours of darkness or foggy days when visibility was reduced. When civilians did move about the city during hours of daylight, they would often select routes that were longer than normal, but less exposed to SRK positions by natural or urban topography or by erected barricades so as to avoid sniping. An extensive system of "screens" was erected to impede snipers' visibility at known "hot spots" and in some areas protective barricades were created from heavy containers or other sturdy materials. When forced to transit exposed areas, they did so running, or hugging the sides of walls to afford the greatest possible protection from the SRK side of the confrontation line. Surgical operations were conducted in cellars, with intermittent power, and hospital patients were huddled in basements to avoid further harm from the shelling that was directed at hospitals. While protective measures were attempted, limited protection could be afforded against the sniping and shelling for civilians in their daily life cycle.

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[21] This reflects the irrelevance, to the question of guilt or innocence, of an Accused's *motives* (*cf.* intent) in criminal law. (See *Prosecutor v. Tadić* Appeals Chamber Judgement, 15 July 1999 (hereinafter *Tadić* Appeals Judgement), para. 268).

iv. THE INDIVIDUAL AND COMMAND RESPONSIBILITY OF THE ACCUSED

30. During all periods relevant to this Indictment, the Accused bears individual criminal responsibility for the conduct charged therein, pursuant to Article 7(1) of the Statute.

31. As the Commander of the SRK, the Accused is also responsible, in addition or in the alternative, for his failure to take necessary and reasonable measures to prevent unlawful acts which he knew, or had reason to know, that his subordinates were about to commit, or to punish those which had been committed. By failing to take the actions required of a person in superior authority, the Accused is responsible for the acts and omissions set forth below pursuant to Article 7(3) of the Statute.

The Accused and his superior responsibility

32. The Accused was born on 12 March 1943 in Goles village, Banja Luka Municipality. From at least 17 October 1991 until early September 1992, he was the Commander of the 30th Partizan's Brigade of the 1st Krajina Corps operating in the area south-west of Banja Luka. He was promoted from Colonel to the rank of Major-General in the VRS in late 1992.

33. The continuity of command structure, doctrine and key personnel between the JNA and the VRS was vital in shaping the fundamental operational doctrine and values of the SRK. Consistent with this *de facto* continuity, JNA military doctrine, operational strategy and tactics continued to be used by the VRS even after the JNA's formal withdrawal from Bosnia and Herzegovina. As a trained professional senior JNA officer, the Accused was cognisant with the relevant JNA doctrine.

34. During the indictment period, the SRK was a Corps of the VRS under the ultimate military command of Ratko Mladić, the Commander of the Main Staff. As Corps Commander, the Accused was responsible for planning, directing and monitoring the activities of subordinate units in the SRK zone of responsibility, and for ensuring that his orders were implemented.

35. After the Accused assumed command of the SRK on or about 10 September 1992, there was no perceptible change in the campaign of sniping and shelling. The Accused thus became the implementor of a pre-existing strategy and participated in both the legitimate military campaign against the ABiH and the unlawful attacks directed against the civilian population of Sarajevo.

36. The sniping and shelling of civilians during the indictment period was carried out by military personnel which included SRK units and other persons under the command and/or control of the Accused. The Prosecution submits that the Accused exercised at least *de facto* control over all forces operating within the front lines he controlled in the Sarajevo vicinity. Although the identity of the individual snipers and artillery units is unknown in relation to each of the scheduled incidents and others of a similar character of which evidence will be led, the fire emanated from areas under the Accused's control.

37. With regard to persons who may have been outside the Accused's formal chain of command, but who nevertheless operated within his area of territorial responsibility, the Prosecution submits that the Accused is deemed, in accordance with military doctrine, to have had knowledge of the activities of such forces.[22] This reality is underscored by many unique characteristics of the Sarajevo theatre, such as the fact that the front lines remained relatively static throughout the indictment period.

38. The Accused accordingly bears individual criminal responsibility for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the campaign of sniping and shelling of the civilian population of Sarajevo. He is also, or alternatively, criminally responsible as a superior for failing to take reasonable steps to prevent or punish the acts of his subordinates in this regard.

v. THE ACCUSED'S CONTROL OVER SNIPING

39. Snipers were a recognised and integrated part of the organised units, operating within the chain of military command of the SRK. There were proper lines of communication between snipers and their superiors.

40. As Commander of the SRK, the Accused demonstrated his authority and control over the sniping of civilians, *inter alia*, by providing logistical support (such as fuel and ammunition) to snipers and sniping units, and by the efficacy of the cease-fires which were called periodically during the indictment period. The fact that the Accused was able to halt sniping

[22] The Trial Chamber in *Blaškić* specifically addressed so-called "special units" which did not form an official part of the Accused's Operative Zone structure and organisation. As these units were nevertheless deployed to, and operated within, the Accused's operative zone, the Trial Chamber noted that it is simply "inconsistent with military principles for the commander of an operational area not to have authority over all the troops acting within the confines of his area of responsibility." (*Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000 (hereinafter *Blaškić* Judgement), para. 451. The expert witness in this case, whose testimony was accepted by the Court, proceeded to note that "... normally in the army, when a person is in command of a specific area of responsibility, he commands *ipso facto* all the military units located in that area" (*idem*).

when he saw fit suggests that those responsible for such activities, whether formally within or outside the SRK structure, were highly responsive to his command.

41. The origin of sniper fire supports the above inferences that the Accused either directly sanctioned or at least tolerated the instances of sniping set forth in the schedule to this Indictment and others of a similar character. The vantage-points overlooking the city, from which sniping routinely occurred, comprised locations of tactical significance, which a responsible commander would in all circumstances seek to strictly control access to, and activity within.

42. As such, the Accused bears responsibility for the sniping of the civilian population of Sarajevo as set forth in the schedule to the Indictment, whether as a result of his planning, instigating, ordering or aiding and abetting of these unlawful acts or through his failure to prevent or punish such conduct.

vi. THE ACCUSED'S CONTROL OVER SHELLING

43. The scheduled shelling incidents and others of a similar character were carried out either by forces or individuals under the command and control of the Accused and/or originated from areas under his territorial control. The Accused was therefore responsible, directly and indirectly, for those unlawful acts of shelling.

44. The Accused demonstrated his authority and control over shelling by the SRK, *inter alia*, by controlling the intensity and frequency of shelling of targetted areas; participating in negotiations regarding the use of heavy weapons; implementing a heavy weapons total exclusion zone; controlling access of the United Nations Protection Force (UNPROFOR) and other UN personnel to territory around Sara-jevo (in particular, weapons positions sites); by conducting co-ordinated military operations, including indirect fire support (i.e. shelling) in pursuit of legitimate military objectives and through the control of logistical support to Corps units.

45. The high level of *de facto* control of the Accused over shelling is demonstrated by the fact that the duration and tempo of hostilities were responsive to the Accused's command. During the period of his command, for instance, the Accused and his subordinate staff had regular contact with the representatives of UNPROFOR command and received numerous official protests about the conduct of his forces attacking civilians. Protests after the fact were frequently met

with denials or blame was attributed to the ABiH forces; it was nevertheless noticeable that the shelling would often cease shortly afterwards.

46. There appeared to be some correlation between the intensification of attacks against civilians, on the one hand, and VRS military and negotiation setbacks generally, on the other. Far from comprising the actions of undisciplined elements, the timing and tempo of these attacks illustrated that they were deliberately intended by the Accused and were responsive to broader developments within the course of the conflict. It further suggests that these attacks were co-ordinated and directed at the level of the Corps command and above, so as to achieve the strategic aims of the VRS and the *Republika Srpska* political authorities.

47. The Prosecution submits that the Accused's control over shelling also follows inexorably from the nature of the weaponry used to carry it out. Military doctrine indicates that this weaponry was controlled within the ranks of the VRS up to the level of the Corps Commander. Many of the weapons engaged in the campaign against civilians were part of standard batteries, centralised under the command of the SRK or its brigades. These weapons, by virtue of their operational significance, were controlled at a higher level, i.e. brigade and corps level. They included batteries of 155mm, 122mm, 105mm and 100mm field artillery and 128mm multiple rocket launders. 120mm and 82mm mortars – weapons which were used in the unlawful campaign of shelling against the civilian population of Sarajevo – were held and controlled at battalion level.

48. The level of control to which such armaments are subject creates, in turn, the overwhelming inference that the Accused would have been aware of the purposes for which they were being employed and sanctioned their use in such a manner.

vii. THE COMMAND RESPONSIBILITY OF THE ACCUSED

49. In addition to his direct criminal responsibility under Article 7(1), the Prosecution submits that the Accused had either actual or constructive knowledge of the unlawful attacks against the civilian population of Sarajevo. This, in conjunction with his failure to do all that was reasonably practicable under the prevailing circumstances to effectively prevent and punish this unlawful conduct establishes his additional responsibility under Article 7(3) of the Tribunal Statute, as set forth in the section entitled "applicable legal principles," below.

Notice: Actual knowledge

50. The Prosecution submits that the Accused knew of the campaigns of sniping and shelling by reason of, *inter alia,* his regular contact, both personally and through his staff, with personnel such as representatives of UNPROFOR and United Nations Military Observers (UNMOs). These individuals made numerous and regular official protests to the Accused or his designated subordinates concerning attacks committed by VRS forces against the civilian population. Accordingly, the Accused was frequently and explicitly put on notice of several of the incidents enumerated in this Indictment and many others of a similar character.

51. Sniping and shelling of the civilian population was a recurring topic of negotiations between the warring factions and UNPROFOR. As the Commander of the SRK and thus engaged at a high level in such negotiations, the Accused was aware that civilians in Sarajevo had been the target of shelling and sniper attacks carried out by his forces or emanating from areas under his command and control.

52. There were several operational features from which an overwhelming inference of the Accused's actual knowledge of the unlawful attacks can be drawn. For example, the Forward Command Post of the SRK was located in Lukavica barracks to the south-west of the city centre. These headquarters were proximate to the front lines encircling Sarajevo. In addition, the SRK controlled most of the high ground to the south of Sarajevo and thus had a dominating view of the city and its environs and the location of both military and civilian targets. Moreover, for most of the relevant period, the front lines around Sarajevo remained static.

53. The Accused also had at his disposal a professional military staff, including personnel with intelligence-gathering and reporting capacities and functions, and officers who liaised with UNPROFOR, thus facilitating ease of communication. The evidence will establish that these individuals were provided with notice of the sniping and deliberate or reckless shelling of civilians from the SRK side of the confrontation line.

54. The combination of these factors, including the presence of the international media, ensured that the Accused had available to him the means to obtain frequent and highly-accurate information regarding the nature and type of particular attacks carried out by the forces under his command.

55. The Prosecution also reiterates the high tactical value and importance of tanks and artillery, as noted above. The Prosecution submits that such weapons would therefore have been subject to a high degree of control and to have been under the close scrutiny of the high level command.

56. Finally, the sheer number, and local and international notoriety, of many of the incidents, singly and collectively, alleged herein imputes knowledge to the Accused.

57. Accordingly, on the basis of these factors and the circumstantial evidence set forth above, no other reasonable inference exists other than that the Accused had actual knowledge of the unlawful attacks against the civilian population of Sarajevo by forces under his effective control.

Notice: Reason to know

58. Additionally and in the alternative, the Accused had reason to be aware of such activities carried out by his subordinates. As is set forth below, this basis of responsibility reflects the duty of superiors to be aware of the activities of their subordinates and to apprise themselves of the information which is available to them regarding these activities.

59. The Accused, as Commander of the SRK, had an active duty to inform himself of the activities of his subordinates. In particular, he had a duty to ensure that his orders were being carried out and that an effective reporting system was established for subordinates to report their activities to the Corps Command. The Accused also had an obligation to exercise control down this chain of command so as to prevent unlawful acts being perpetrated by troops under his command. Moreover, these obligations of a Corps Commander to be proactive with regard to scrutinising and controlling the activities of the forces under his command find expression within the relevant VRS regulations which were in force during the indictment period and of which the Accused was cognisant.

60. The numerous operational aspects set forth above indicate that, had the Accused availed himself of the information which was at his disposal concerning the actions of his subordinates, he would have been cognisant of those activities which were carried out by personnel under his command and control and which form the basis of this Indictment.

61. Moreover and as a result, *inter alia,* of the numerous official protests set forth above, the Accused was placed on sufficient notice that the unlawful acts as set forth in the Indictment

had occurred, were occurring or were about to occur, during the tenure of his command. He was accordingly obliged, *inter alia,* to make further enquiries regarding the activities of his troops, to take measures to prevent the occurrence or continuance of any unlawful acts which may have emanated from his area of responsibility, and to investigate or refer for prosecution allegations of unlawful conduct which may have previously occurred. His failure to take such necessary and reasonable preventative or punitive measures ensures that he bears responsibility under Article 7(3) of the Statute.

62. Further submissions concerning the nature of the Accused's superior responsibility are set forth below in the Prosecution's submissions on applicable legal principles.

Measures to prevent and punish

63. The Accused failed to take necessary and reasonable measures to prevent or punish those implementing the unlawful campaign of shelling and sniping against the civilian population. The obligations of the Accused to take such measures are set out below in greater detail, in the section on applicable legal principles.

64. The Accused had several preventive or punitive measures at his disposal that he could reasonably have employed, given the prevailing circumstances. The measures which would have been available to the Accused as the Corps Commander included, but were not limited to, the issuing of orders forbidding such attacks on civilians, amendments or clarifications to the Rules of Engagement governing the conduct of his forces with regard to targeting and limiting levels of civilian casualties, the taking of certain non-judicial measures of disciplinary action and/or the submission of reports to the competent authorities in order that proper measures be taken.[23] He would have had, in addition, the ability to remove from front-line or other positions persons or units carrying out unlawful attacks and to commence investigations into such infractions. The Accused would also have been able to effect improvements to the level of training and discipline available to the unit commanders *vis-à-vis* the individual offenders.

65. The Accused failed to take these or other necessary and reasonable measures available to prevent and punish the incidents set forth in the Indictment or others of a similar character. The extent of the Accused's dereliction of duty in this regard is underscored by the fact that during the same period, the Accused was willing and able to take appropriate administrative

[23] *Blaskic* Judgement, para. 302.

measures and sanctions in relation to other infractions of military discipline, whilst simultaneously allowing serious violations of international humanitarian law to remain unpunished.

66. Moreover, the Prosecution notes the prolonged period of the unlawful campaign, which pre-dated the Accused's command and extended throughout it. This period was more than sufficient for the Accused to have become fully cognizant of the prevailing operational conditions, to have obtained full command and control of the SRK and personnel on the territory it controlled and to have addressed any deficiencies in communications and discipline which may have existed.

II. APPLICABLE LEGAL PRINCIPLES

67. The modes of participation and bases of criminal responsibility alleged by the Prosecution below should be read in conjunction with the elements of the offences under Articles 3 and 5 of the Statute, which follow this section.

i. DIRECT CRIMINAL RESPONSIBILITY UNDER ARTICLE 7(1) OF THE STATUTE

68. The Prosecution considers that all crimes covered in this Indictment entail the individual criminal responsibility of the Accused under Article 7(1). The Prosecution's case is that while the Accused, as Corps Commander, is not charged with having been the actual perpetrator of the *actus reus* of any of the crimes set forth in the Indictment, he planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the infliction of terror upon the civilian population of Sarajevo and the campaign of shelling and sniping alleged in the Indictment and charged under Articles 3 and 5 of the Statute.

General

69. Criminal responsibility under this Article can be established where any one or more of the alternatives set forth in Article 7(1) is proved. Article 7(1) of the Statute thereby encompasses the principle that all those who contribute to the commission of a crime should be held individually accountable.[24]

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[24] The principles of individual criminal responsibility enshrined in Article 7(1) reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the Tribunal is not limited to persons who directly commit the crimes in question. (*Prosecutor v. Delalić, et al.*, Judgement, 16 Nov. 1998, para. 328 (hereinafter *Čelebići* Judgement), para. 328; *Blaškić* Judgement, para. 286).

70. Furthermore, the elements of the *actus reus* of a crime may be performed both through positive acts by the Accused, or through his or her omissions, or a combination thereof.[25]

71. In order for individual criminal responsibility to ensue, conduct must be coupled with intent.[26] In relation to each of the crimes charged, and in respect of all forms of criminal responsibility, the *mens rea* of the Accused need not be explicit but may be properly inferred from all the circumstances.[27]

72. Under Article 7(1), an Accused could be culpable if he or she participates with knowledge that he or she is contributing to the criminal conduct of the other participants.[28] Furthermore, this knowledge requirement is satisfied where the Accused's conduct is performed in the awareness of the substantial likelihood that a criminal result will occur as a consequence of his or her conduct.[29]

73. Different considerations apply in respect of the *mens rea* of inflicting terror on the civilian population, which is characterised by a special intent requirement, as discussed below. To meet the requirements of that crime, unlawful acts or threats of violence must be committed with the "primary purpose" of spreading terror among the civilian population. The Prosecution submits that the Accused satisfied this *mens rea* standard, as well as that required for all other charges set forth in the Indictment. As noted above, the *mens rea* requirement for the charge of terror, like that of the other crimes charged, may properly be inferred from all the circumstances.

"Planning"

74. The Prosecution submits that the Accused can be adjudged responsible under Article 7(1) for the crimes charged in the Indictment on the basis that he, in concert with others, planned the unlawful campaigns of terror and of sniping and shelling of the civilian population of Sarajevo.

75. "Planning," a crime under Article 7(1) of the Statute, requires proof of the following elements: (i) the *actus reus* of the crime was performed by a person or persons other than the

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[25] *Prosecutor v. Tadić*, Judgement, 15 July 1999 (hereinafter *Tadić* Appeals Judgement), para. 188.
[26] *Tadić* Judgement, para. 688.
[27] *Čelebići* Judgement, para. 328.
[28] *Čelebići* Judgement, para. 328; *Tadić* Judgement, paras. 675-676.
[29] *Tadić* Appeals Judgement, para. 220 ("What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required …").

Accused, with or without the latter's participation;[30] and (ii) the conduct of that person or persons was in execution of a plan of the Accused and (iii) that the Accused had the *mens rea* of the crime.

76. The *mens rea* of the superior who plans is wilfulness: that is, either intention or recklessness.[31] Regarding the crime of terror, the Accused's conduct must be coupled with the primary purpose of spreading terror among the civilian population.

77. Responsibility for "planning" may involve different levels of command and, accordingly, different levels of "planning".[32] The existence of an unlawful plan of sniping and shelling directed against civilians may be proved circumstantially.[33] "Planning" may also be inferred from a diversity of factors; indicia which are relevant to "ordering" as well, and which are also listed in that section below.[34]

"Instigating"

78. The essence of "instigation" in Article 7(1) is that the Accused induced another person or persons to commit a crime.[35] The instigation need not be a condition *sine qua non* for the conduct of the direct perpetrator; i.e. it need not be proved that the crime would not have been committed at all but for the intervention of the Accused. It need only be proved that the instigation was *a clear contributing factor* to the commission of the crime, and thus that there was a causal relationship between the instigation and the physical perpetration of the crime.[36]

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[30] The *Akayesu* Trial Chamber held that "planning" should be understood as "implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases" (*Prosecutor v. Akayesu,* Judgement, 2 September 1998 (hereinafter *Akayesu* Judgement), para. 480). The underlying crime need not be executed by the planners, nor is their involvement in the commission of the offence required in any other way. However, the crime planned must be carried out in order to make the planner punishable, since there is no criminal responsibility for attempted offences or conspiracy under the Statute, except for genocide pursuant to Article 4(3)(d) (*id*, para. 473).

[31] *Blaškić* Judgement, para. 267.

[32] For instance, those in superior command positions may be the "overall architects" of the military campaign, determining, for instance, overall strategy and operational requirements. However, the field commander may, at the tactical level, have considerable latitude in determining his or her own tactical plan in accordance with superior commander's operational requirements. Hence, "planning" may also encompass a field commander developing his or her "own" plans, necessary to implement those coming from the higher level of responsibility. See also *Prosecutor v. Kupreskić,* Judgement, 15 January 2000 (hereinafter *Kupreskić,*Judgement), para. 862, where a commander that has been held criminally liable for passing orders from his superiors to his subordinates is also considered to have "assisted in the strategic planning of the whole attack."

[33] *Blaškić* Judgement, para. 279.

[34] These factors include: (1) the number of illegal acts; (2) the number, identity and type of troops involved; (3) the logistics involved, if any; (4) the widespread occurrence of the acts; (5) the tactical tempo of operations; (6) the *modus operandi* of similar illegal acts; (7) the officers and staff involved; and (8) the location of the superior at the time. (UN Commission of Experts, *Final Report*, S/1994/627, 27 May 1994, (hereinafter UN Commission of Experts, *Final Report*), p. 17). These factors were cited with approval in the *Blaškić* Judgment, para. 307 and *Čelebići* Judgement, paras. 384-6.

[35] *Akayesu* Judgement, para. 482 ("[Instigating entails] prompting another to commit an offence"); *Blaškić* Judgement, 280.

[36] *Blaškić* Judgement, para. 278. To be criminally liable for "instigating" a crime, the Accused must have the necessary *mens rea* for the offence that the Accused was seeking to instigate. However, it is not necessary to prove that any of the persons executing the plan had the requisite *mens rea*, although he or she must have acted in furtherance of a plan or order (*idem*). It

79. Instigation can be express or implied, and can also be by omission rather than by a positive act, provided that it is proved that the conduct of the Accused was intended to cause the direct perpetrator to act in a particular way, and had that result.[37]

80. With regard to omissions, these have been held to amount to instigation in circumstances where a commander has created a permissive environment toward subordinates with regard to criminal behaviour. In such circumstances, the repeated failure of a commander to punish prior unlawful conduct may amount to instigation provided that it can be established that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones.[38]

81. The *mens rea* requirement of instigation is satisfied where an Accused intended to cause the commission of a crime, or was aware of the substantial likelihood that a crime would result from his or her conduct.[39]

82. Again, in relation to special intent crimes such as inflicting terror on the civilian population, it has to be proved, whether directly or inferentially, that the Accused had the special intent, in this case the primary purpose to inflict terror upon the civilian population.[40]

"Ordering"

83. The Prosecution further submits that the Accused can also be considered responsible under Article 7(1) for the crimes charged on the basis that he, alone or in concert with others, ordered them.

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is not necessary that this order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence (*ibid,* paras. 278, 281; *Akayesu* Judgement, para. 483).

[37] *Blaškić* Judgement, para. 280.

[38] *Ibid*, para. 337: "... the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) ... also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes." See also *ibid,* para. 339, citing the *Čelebići* Judgement, para. 400, which held that such a causal connection was "not only possible but likely" to exist.

[39] Moreover, the Accused can be responsible for "instigating" a crime which he or she knew would be a likely result of the conduct which he or she sought to instigate, even if the particular crime committed was not the purpose of the instigation (*Akayesu* Judgement, para. 481)

[40] In *Akayesu,* the Trial Chamber imported a further requirement into the notion of instigation, finding that this form of criminal participation under the ICTR Statute's equivalent of Article 7(1) required the incitement in question to be "direct and public", thus considering incitement to commit all crimes in the same way as the separate provision on incitement to commit genocide in Article 4(3)(c) of the Statute (where the requirement that the incitement be "direct and public" is expressed) (*Akayesu* Judgement, para. 481). The Prosecution has appealed this finding (Prosecutor's Appeal Brief, 10 July 2000). Moreover, the Prosecution notes that in the more recent case of *Blaškić,* the ICTY Trial Chamber found that the Accused's failure to punish subordinates for previous offences amounted to the instigation of future crimes, making no reference whatsoever to any need for this incitement to have been "direct and public" (*Blaškić* Judgement, para. 339).

84. "Ordering" a crime under Article 7(1) has the following elements: (i) the *actus reus* of the crime was performed by a person or persons other than the Accused, with or without the latter's participation; (ii) the perpetrators acted in execution of an express or implied order given by the Accused to a subordinate or other person over whom the Accused was in a position of authority; and (iii) the Accused had the required *mens rea* of a crime within the jurisdiction of the Tribunal.

85. In general, the required *mens rea* of a person in authority who orders a crime is wilfulness; that is, either intention or recklessness.[41] The *mens rea* requirements of "ordering" are met if the Accused is aware of the substantial likelihood that a crime within the jurisdiction of the Tribunal will be committed as a result of the execution of the order, even if the crime that was committed was not the purpose of the order. In this regard the Trial Chamber has held that advertence to, and voluntary assumption of, risk on the part of a military commander may satisfy the *mens rea* requirement of "ordering".[42]

86. What is relevant is the *mens rea* of the person issuing the order, not that of the subordinate executing it.[43] It is unnecessary to prove that the subordinates who executed the order shared the *mens rea* of the Accused. Therefore, it is irrelevant whether the illegality of the order was apparent on its face; i.e. the order need not have explicitly required the commission of a crime.[44] Where, however, an order is criminal on its face, a commander is under a strict duty to actively oppose it.[45]

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[41] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* International Committee of the Red Cross, Geneva, 1987 (hereinafter ICRC Commentary), para. 3473; *Blaškić* Judgement, para. 267.
[42] See for example *Blaškić* Judgement, para. 474: "Even if doubt were still cast in spite of everything on whether the Accused ordered the attack with the clear intention that the [Ahmići] massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes. [... A]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the [commission] of the crimes." The Trial Chamber at this juncture paid particular heed to the Accused's knowledge that the troops which he had used to carry out the order in question had previously been guilty of many crimes against the Muslim population of Bosnia.
[43] *Blaškić* Judgement, para. 282.
[44] *Idem.*
[45] *See High Command Case*, p. 512 (emphasis added): "[a]ny participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, *constitutes a criminal act on his part*". The responsibility of a commander who fails to oppose an order that is passed through him or independent of him directly to his subordinates, in the awareness of its criminal nature (or of the substantial likelihood of its criminal nature), may fall within the scope of Article 7(1) of the Statute for ordering or aiding and abetting (as discussed below). It is sufficient that he is considered merely to have acquiesced or tacitly approved of the order being complied with, even through his or her pure omission.

87. As noted above, different considerations apply in respect of the terror count, which would, in this context, require that the Accused, as the person ordering, did so with the primary purpose of terrorising the civilian population.[46]

88. The Prosecution submits that a commander who, in the awareness of the criminal nature of an order, or of the substantial likelihood of its criminal nature, fails to oppose it when it is passed to subordinates, whether through him or her or independently, can be responsible under Article 7(1) of the Statute.[47] The order need not be given by the Accused directly to those who actually perform the *actus reus* of the crime. An order to commit a crime may be handed down through several levels of the chain of command before it reaches the persons who will implement it. In such a situation, each individual commander who transmits a criminal order may be liable for "ordering" the commission of a crime, since each person receiving the order to commit crimes and accordingly instructing his or her subordinates does not merely "pass it on", but rather uses his or her own powers to "order" the commission of a crime. Provided he or she had the requisite *mens rea,* such a person is liable under Article 7(1).[48]

89. The particular gravity of "ordering" a crime emerges from the special situation of the person in a position of authority. He or she who controls a hierarchically organised system can rely on the fact that the order will be accomplished, without even having to know the identity of the actual executioner. Contemplated from the perspective of the person holding a position of authority, the members of the organisation are merely interchangeable pieces. This particular position has been described in the following way:

> In the opinion of this court, the defendants are responsible for the crimes committed by their subordinates independently of the criminal responsibility of the latter. The criminal acts perpetrated by the subordinate officers were always under the control of the defendants. Hence they must answer as indirect perpetrators even if some of the direct perpetrators can be exempt from criminal responsibility. Under these circumstances, the question of who perpetrated the crimes is not so important. The control of those who headed the system was absolute. Even if a subordinate refused to

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[46] It is unnecessary to prove the further objective, if any, which was to be achieved by terrorising the civilian population (see *supra,* para. 25).

[47] In such a scenario, the inaction of the commander may be considered to constitute a silent approval of the order, which, given his authority, amounts to a direct and substantial contribution to the criminal events performed in execution of the order. In such a situation, acquiescence of the commander through his or her inaction contributes to ensuring compliance with the order despite its evident unlawfulness, by reinforcing the image of official encouragement and tolerance *vis-a-vis* the perpetration of crimes. Sending a "clear signal of official tolerance" for the commission of crimes was considered to be a form of aiding and abetting by the *Akayesu* Judgement, paras. 693-94.

[48] *The High Command Case*, Judgement, Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10, Volume 11, ("*The High Command Case*"), p. 511; *see also* German Federal Supreme Court, BGH NJW 1996, 2042, 2043. This position has expressly been endorsed by the *Kupreskić* Trial Chamber, while holding that an Accused had "passed on the orders of his superiors to his men" (*Kupreskić* Judgement, para. 827), which "amounted to the reissuing of the orders that were illegal in the circumstances" (*ibid,* para. 862).

> obey, he would be automatically replaced by another who would conform to the directives ... *Whoever controls the system, also controls the anonymous will of all its human components.*[49]

This reasoning has led to the conclusion that a person who orders a crime is actually a *perpetrator by means*.[50]

90. While responsibility for "ordering" under Article 7(1) requires that the Accused actually gave an order, this may be proved circumstantially; there is no requirement of direct evidence that an order was given.[51] Furthermore, there is no requirement that the order be in writing or in any particular form.[52] The fact that an Accused in a position of authority "ordered" a particular crime may be inferred from a diversity of factors. As noted above, the same indicia are relevant for the purposes of establishing individual criminal responsibility for "planning," and are relevant also to the question of the knowledge of the Accused under Article 7(3), as noted below. These factors include:

(1) the number of illegal acts;
(2) the number, identity and type of troops involved;
(3) the logistics involved, if any;
(4) the widespread occurrence of the acts;
(5) the tactical tempo of operations;
(6) the *modus operandi* of similar illegal acts;
(7) the officers and staff involved; and
(8) the location of the superior at the time.[53]

91. Proof of "ordering" in the present case can be derived circumstantially from the nature of the authority of the rank of the Accused and the quality of his actual and *de jure* command over the operational zone in question. As the Accused was a military commander exercising both operational and tactical command over the zone of confrontation, the fact that his forces

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[49] Federal Criminal Court of Appeals for the Federal District of Buenos Aires, Case No. 13 (*Juntas Trial*), Judgement, 9 December 1985, 8 *Human Rights Law Journal*, 415-17 (emphasis added).
[50] Kai Ambos, Commentary to Article 25, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, p. 480.
[51] See International Military Tribunal for the Far East, Judgement: "During a period of ... months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale *so vast, yet following so common a pattern* in all theatres that *only one conclusion is possible* – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces", (*Law Reports of Trials of War Criminals*, Volume XV, London, 1949, p. 65, emphasis added by the commentator). As stated in the commentary , the decision deals with circumstantial evidence as a basis for the conclusion that "a superior *must be taken to have* ordered or connived at offences on the part of his subordinates" (emphasis in the original).
[52] An Accused may be held responsible for ordering the commission of a crime if the conduct of the Accused *vis-à-vis* his or her subordinates is intended to be, and is understood as, an implicit order. *See*, *Trial of Brigadeführer Meyer (the Abbaye Ardenne Case)* IV Law Reports 97, at 108: "There is no evidence that anyone heard any particular words uttered by the Accused which would constitute an order, *but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially*; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that *the only reasonable inference* is that an order that the prisoners be killed was given by the Accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the Accused guilty" (emphasis added).
[53] UN Commission of Experts, *Final Report*, p. 17 (cited with approval in the *Blaškić* Judgment, para. 307; *Čelebići* Judgement, paras. 384-86).

engaged in frequent attacks of a sustained character and tempo involving shelling and sniping of civilians creates a compelling inference that they were ordered to do so by the commander.

"Aiding and Abetting"

92. The Prosecution further submits that the Accused is responsible under Article 7(1) for aiding and abetting the crimes charged in the Indictment. The elements of this form of participation are the following: (a) the Accused, by his or her conduct, directly and substantially contributed to the commission by another person of the *actus reus* of a crime; and (b) the Accused knew that his or her conduct would substantially contribute to the commission by another person of the *actus reus* of a crime, or was aware of the substantial likelihood that this would be a probable consequence of his or her conduct.[54]

93. In order to constitute "aiding and abetting" under Article 7(1) of the Statute, the conduct of an Accused must have a "substantial" effect on the commission of a crime, *i.e.*, it must facilitate the commission of a crime in some significant way.[55]

94. The contribution of the aider and abettor need not constitute an indispensable element for the principal's commission of the crime. Moreover, the fact that the same assistance could have been obtained from another person does not affect the culpability of an aider and abettor.[56]

95. There is no requirement of a pre-existing plan between the principal and the aider and abettor.[57] Where such a plan exists, all those who knowingly participate in and contribute to this purpose may be held criminally responsible under Article 7(1), either as co-perpetrators or as aiders and abettors.[58]

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[54] Both "aiding" and "abetting" constitute forms of complicity. However, the two concepts are distinct: "aiding" means giving assistance to someone; "abetting" implies facilitating the commission of an offence. Either aiding or abetting alone suffices to render an Accused criminally responsible under Article 7(1) (*Akayesu* Judgement, para. 484).
[55] Certain judgements refer to a "direct and substantial" effect (*Čelebići* Judgement, para. 326; *Tadić* Judgement, paras. 681-689) although the qualifier "direct" may be considered to be redundant, the essence of aiding and abetting being the "substantial" nature of the contribution (*Prosecutor v. Furundžija,* Judgement, 10 December 1998 (hereinafter *Furundžija* Judgement), paras. 232-5; *Prosecutor v. Kayishema and Ruzindana,* Judgement, 21 May 1999 (hereinafter *Kayishema* Judgement), paras. 199, 207, *Prosecutor v. Aleksovski,* Judgement, 25 June 1999 (hereinafter *Aleksovski* Judgement), para. 61.
[56] *Furundžija* Judgement, paras. 224, 232-235; *Kayishema* Judgement, para. 201.
[57] *Tadić* Judgement, para. 677; *Čelebići* Judgement, para. 328.
[58] *Čelebići* Judgement, para. 328.; *Kayishema* Judgement, paras. 203-204.

96. Aiding and abetting does not require participation in the physical commission of the crime. As long as it has a direct and substantial effect on the commission of the offence, the conduct of the Accused may constitute aiding and abetting under Article 7(1), even if it is "removed both in time and place from the actual commission of the offence."[59] Thus, an aider and abettor need not be physically present when the crime is committed.[60]

97. "Aiding and abetting" may assume a variety of forms of assistance. Mere presence at the scene of a crime can constitute "aiding and abetting" if it has an encouraging effect on the perpetrators,[61] or gives them moral support[62] or psychological support,[63] or has a "significant legitimising or encouraging effect on the principals,"[64] or has a "significant effect on the commission of a crime by promoting it,"[65] even if the Accused takes no active part and provides no material assistance. Other forms of aiding and abetting include where the Accused provides the perpetrator with the means to enable the crime to be committed.

98. Omissions, as well as positive acts, may constitute aiding and abetting, in particular where there is a legal obligation to intervene. Aiding and abetting by omission may also be alleged where a person in a position of authority fails to maintain law and order and to oppose killings and causing serious bodily or mental harm thereby providing tacit encouragement that falls within the confines of Article 7(1).[66]

99. Furthermore, if an Accused is in a position of authority *vis-à-vis* the perpetrators of the crime, this constitutes a relevant factor in determining whether his or her conduct lent encouragement or support to the perpetrators.[67] Acts of a commander before or during the commission of a crime, indicating knowledge of the criminal event and acquiescence within it, may also amount to a direct and substantial contribution to the crime.

100. The *mens rea* of aiding and abetting is satisfied if it is proved that the Accused *knew* that his or her conduct would assist the principal in the commission of a criminal act. In this regard, it

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[59] *Čelebići* Judgement, para. 327; *Aleksovski,* Judgement, para. 62.
[60] *Akayesu* Judgement, para. 484; *Trial of Franz Schonfeld and Nine Others*, British Military Court, Vol. XI Law Reports 64, at 70; *Kayishema* Judgement, para. 200.
[61] *Tadić* Judgement, paras. 689-692 (see also, paras. 678-687); *Blaškić* Judgment, para. 284.
[62] *Akayesu* Judgement, paras. 546-548; *Furundžija* Judgement, paras. 232-235.
[63] *Čelebići* Judgement, para. 327.
[64] *Furundžija* Judgement, paras. 205-209, 232-235.
[65] *Aleksovski* Judgement, para. 64.
[66] *Akayesu* Judgement, paras. 704-705; *Blaškić* Judgment, para. 284 ("... The *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime ...").
[67] *Akayesu* Judgement, paras. 693, 704-705.

is necessary to distinguish between *knowledge* that his acts assist the commission of the offence and *intent.* With regard to crimes other than special intent crimes, an accused need not share the *mens rea* of the principal.[68]

101. The existence of the *mens rea* need not have been explicitly expressed, but may be inferred from all relevant circumstances.[69]

ii. CRIMINAL RESPONSIBILITY OF SUPERIORS UNDER ARTICLE 7(3) OF THE STATUTE

102. The Accused is charged in each count of the Indictment with responsibility as a superior under Article 7(3) of the Statute. The Prosecution submits that the Accused is additionally or alternatively responsible on the basis that he either knew, or had reason to know, of the acts committed by his subordinates and that he failed to take the necessary and reasonable measures to prevent or punish such acts.

103. The Appeals Chamber in *Čelebići* identified the following elements as necessary to establish superior responsibility under Article 7(3):

(i) the existence of a superior-subordinate relationship between the commander (the Accused) and the perpetrator of the crime;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(ii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[70]

Superior-Subordinate Relationship

104. Individuals in positions of authority, whether civilian or military, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors.[71]

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[68] The *mens rea* requirement of aiding and abetting is met where the Accused is aware of the substantial likelihood that his or her conduct will make a direct and substantial contribution to the commission of a crime. Accordingly, an Accused may be held criminally responsible for the foreseeable consequences from the commission of his or her acts. (*Čelebići* Judgement, paras. 327-328; *Furundžija* Judgement, para. 245; *Kayishema* Judgement, paras. 205-206). Thus, "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor" (*Furundžija* Judgement, para. 246).
[69] *Čelebići* Judgement, paras. 327-328. For example, where the conduct of an Accused objectively contributed to a plan of unlawful attacks, and in all circumstances the Accused "must have known" of the plan, the intent to participate in its execution may be inferred (see *Trial of Joseph Altstötter and Others (The Justice Case)*, US Military Tribunal, Vol. VI Law Reports 1, at 88).
[70] *Čelebići* Judgement, para. 346.

105. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility. The Trial Chamber held, however, that the superior must have "effective control" over the perpetrators, that is, "having the material ability to prevent and punish the commission of these offences."[72]

106. The Prosecution submits that an individual occupying the *de jure* rank and *de facto* influence of a commander of the Accused is undoubtedly a superior for the purposes of Article 7(3).

Knew or had reason to know.

Knowledge

107. The Accused, as Commander of the SRK, knew that his subordinates were carrying out a campaign of widespread sniping and shelling, which forms the basis of the charges in the Indictment. The actual knowledge of the Accused can be established both directly and circumstantially.[73]

108. In terms of direct methods of proof, the Prosecution notes that an unprecedented number of knowledgeable United Nations and other intermediaries were present in the area throughout the entire duration of the battle of Sarajevo, and that formal protests against apparent violations of the laws of armed conflict were delivered in person directly to the Accused. As noted previously, this evidence will demonstrate beyond all reasonable doubt that the Accused was expressly put on notice of at least certain of the violations in question.

109. The Commission of Experts Final Report set forth indicia that could be taken into account to establish knowledge circumstantially; indicia which the Prosecution submits may also be invoked with regard to establishing that the superior had "reason to know" of crimes committed by subordinates.[74]

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[71] *Ibid*, para. 354.
[72] As such, someone with only administrative powers would generally not bear superior responsibility, whereas someone within the military chain of command at the rank of military commander would. (*Čelebići* Judgement, paras. 378).
[73] *Čelebići* Judgement, para. 386. For an example where the Accused appears to have been found to have actual knowledge on the basis of circumstantial evidence, see *USA v. Pohl et al,* in *Trials of War Criminals,* Vol. V, p. 1055. In this case, the Tribunal appeared to find that in actual fact the Accused must have known, on the basis that he "... could not help knowing about concentration camp labor in the DEST enterprises. In Sachsenhausen-Oranienburg the inmate workers daily passed by the very building in which [the Accused] had his office. Their poor physical condition was obvious" (*ibid,* p. 1053).
[74] These indicia, which has been approved by both the *Blaškić* and *Čelebići* Trial Chambers, includes: the number, type, and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the geographical location of the acts; the widespread occurrence of the acts; the tempo of the operations; the *modus operandi* of

110. In addition, the nature of authority possessed by the superior over the subordinates in question will be relevant to the means of proof as to whether or not the superior had knowledge of his subordinates' conduct. In this regard, the Trial Chambers have distinguished between commanders operating within a highly-disciplined and formalised chain of command as compared to those persons exercising more informal types of authority. The Trial Chamber in *Kordić,* for instance, has noted that "depending on the position of authority held by a superior, whether military or civilian, *de jure* or *de facto,* and his level or responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. For instance, the actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organised structure with established reporting and monitoring systems."[75]

111. The application of these considerations to the facts of this case establishes the actual knowledge of the Accused of the unlawful attacks against the civilian population of Sarajevo. The Prosecution submits that these features, taken together, provided ample mechanisms and adequate time for information regarding particular attacks to move up the chain of command, to be assimilated and for decisions regarding individual attacks to be taken.

112. These circumstances which prevailed during the conflict and the notoriety of certain of the incidents scheduled in the Indictment, in conjunction with the extensive media coverage of which the Accused was aware, render it untenable that a superior of the rank of the Accused did not in fact know of the unlawful acts being committed within his operational zone, which were of a systematic character and which extended over a prolonged period of time.

Reason to Know

113. In the alternative, the Prosecution submits that the Accused had reason to know of the widespread sniping and shelling that forms the basis of the Indictment.

114. The "had reason to know" standard has been recently re-interpreted by the Appeals Chamber in *Čelebići.*[76] On the question of the interpretation of "had reason to know", the Trial

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similar illegal acts; the officers and staff involved; and the location of the commander at the time. (*Blaškić* Judgment, para. 307; *Čelebići* Judgement, paras. 384-86). The Prosecution would in fact maintain that this list should be more expansive and include factors such as character traits of subordinates, events taking place during any temporary absences, lack of instruction of subordinates and the effectiveness of communication systems. (See for example *ICRC Commentary,* para. 3545). However, it submits that on either standard, the requisite *mens rea* can be established in the instant case.

[75] *Kordić* Judgement, para. 428. By contrast, and in the case of *de facto* commanders of more informal military structures, or of civilian leaders holding *de facto* positions of authority, "the standard of proof will be higher" (*idem*).

[76] *Prosecutor v. Delalić et al,* Judgement, Appeals Chamber, 20 February 2001 (hereinafter *Čelebići* Appeals Judgement), paras. 228 *et seq.* The approach taken by the *Blaškić* Trial Chamber was rejected by the ICTY Appeals Chamber in the

Chamber had held that "a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or were about to be committed by his subordinates."[77]

115. The Appeals Chamber elaborated on the meaning to be attached to the information which needs to be available to a superior for him to be considered to have the requisite *mens rea*:

> ... a superior [need not] have information on subordinates offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had reason to know.[78]

116. Significantly, the Appeals Chamber clarified that this information "does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who would receive information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[79] Thus, the relevant information needs only to have been provided or available to the superior, or in the Trial

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Čelebići Appeals Judgement. In doing so, the Appeals Chamber rejected the Prosecution's argument that a commander can be held responsible for the actions of his subordinates based on a failure to obtain information of general nature within his reasonable access due to a serious dereliction of duty. The Appeals Chamber was of the view that the "should have known standard" turned the theory of superior responsibility into a vicarious liability doctrine, akin to a form of strict imputed liability (*ibid,* para. 240).

[77] *Čelebići* Judgement, para. 393. The Appeals Chamber reaffirmed this view, noting that: Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. .... *The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain theknowledge but deliberately refrained from doing so.* (*Čelebići* Appeal Judgement, para. 226 (emphasis added)). The Appeals Chamber further noted in this regard that the Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in criminal liability "comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability."

[78] *Čelebići* Appeal Judgement, para. 238. At this juncture, the Appeals Chamber referred favourably to the ICRC Commentary (Additional Protocol I), which refers to "reports addressed to (the superior), ... the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I. As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system (*idem*).

[79] *Idem.*

Chamber's words, "in the possession of". It is not required that he actually *acquainted himself* with the information.[80]

117. The commander's duty to know of his subordinates' activities has been described as "coextensive with his area of command".[81] In this case, the Accused as commander is responsible for oversight of the entire operational zone under his command; an essential tenet of military doctrine.[82]

118. The evidence in the present case satisfies the "reason to know" test established in the *Čelebići* Appeals judgement.[83] For the reasons set forth above, the Prosecution submits that the Accused was, at the very least, put on further inquiry by the information which was indisputably within his actual possession. This information, in the form of, *inter alia,* numerous complaints from United Nations Military Observers, would have, at a minimum, indicated to any reasonable commander a need for additional investigation in order to ascertain whether offences were being committed or were about to be committed by his subordinates. Furthermore, given the nature of the Accused's command and the reporting and monitoring systems at his disposal, any lack of actual knowledge on the part of the Accused of the unlawful acts perpetrated by forces under his command or control could have stemmed only from a deliberate refusal on his part to acquaint himself with that information which was readily available to him.

119. Finally, the Prosecution notes that particular consideration is due to the special intent requirement in relation to the crime of inflicting terror on the civilian population with the primary purpose of spreading terror. It suggests that in order to establish responsibility under Article 7(3), it is not necessary to prove that the Accused shared the special intent of the subordinates directly responsible for the crime. Rather, the "knew or have reason to know" standard applies, such that the Accused can be responsible for a special intent crime if he or she *knew or had reason to know, including wilful refusal to find out,* that the subordinates were acting with the relevant special intent. Consistent with the particular duties imposed on superiors under international law, this is a lower standard than that applicable to responsibility under Article 7(1).

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[80] In the Appeals Chamber's view, an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question (*Čelebići* Appeal Judgement, paras. 238-39 (footnote omitted)).
[81] *USA v. Wilhelm List et al,* in *Trials of War Criminals,* Vol. XI, p. 1217.
[82] See in this regard the *Blaškić* Judgment, para. 451.
[83] See the "knew or had reason to know" factual submissions, above.

Necessary and Reasonable Measures

120. Superiors must take all necessary and reasonable measures to prevent the commission of offences by their subordinates and if the crimes have been perpetrated to punish the perpetrators thereof. Failure to take such measures that are within his material possibility may render the Accused criminally liable under Article 7(3) as a superior.[84]

121. Any consideration of whether this duty has been met is inextricably linked to the facts of each particular situation and as such, it is difficult to formulate a general standard *in abstracto.* However, the exercise of effective command and control through the proper and diligent application of discipline is a common thread. A commander's degree of effective control will guide a determination of whether he or she reasonably took the measures required either to prevent the crime or to punish the perpetrator.[85]

122. Depending upon the circumstances, the commander's "material ability" may entail, in addition to or instead of issuing orders or taking disciplinary action, other options, including submitting reports to the competent authorities in order for proper measures to be taken,[86] and ultimately and as a last resort, to request his superiors that he be relieved of his command.[87]

123. It is unnecessary for the commander to be the *only one* capable of taking all the necessary measures to punish the subordinates in question.[88] The Trial Chamber in *Blaškić* appeared to find that it is unnecessary for the purposes of Article 7(3) liability that the commander had *de jure* authority to take *all* the necessary measures to punish the subordinates in question. Rather, it suffices that he or she "could have taken some measures"[89] and that he failed to take those measures which were reasonably available to him under the circumstances.

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[84] *Čelebići* Judgement, paras. 394-95.
[85] *Blaškić* Judgment, para. 335; *Čelebići* Judgement, para. 395.
[86] *Ibid,* 302.
[87] See further the similar list of factors set forth in the ICRC Commentary to Additional Protocol I, Art. 87, pp. 1018-22. See also *Trial of Wilhelm von Leeb and Thirteen Others*, United States Military Tribunal (1948) (The German High Command Trial), Law Reports of Trials of War Criminals, Volume XII, pp. 74-75). Referring to the responsibility of a commander for criminal orders are passed down independently of him, the tribunal stated "The choices which he has for opposition in this case are few: (1) he can issue an order countermanding the order; (2) *he can resign*; (3) he can sabotage the enforcement of the order within a somewhat limited sphere. ... Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility" (emphasis added). See also the case of *Mamoru Shigemitsu,* The International Military Tribunal for the Far East, Japanese War Crimes Trials, (29 April 1946- 12 November 1948) (University Press Amsterdam, 1977), Judgement annex A-6; p. 458, which states: "he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. *He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being charged*" (emphasis added).
[88] The Trial Chamber held in *Blaškić* that "the test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate" (*Blaškić* Judgment, paras. 303, 296).
[89] *Blaškić* Judgment, para. 296.

124. The Prosecution submits that the Accused had numerous measures available to him which he could reasonably have taken in all the circumstances to prevent or punish unlawful attacks against civilians. Moreover, it is noteworthy that simultaneous to his failure to employ such measures in relation to the conduct set forth in the Indictment, the Accused appeared to have been able to enforce ordinary military discipline and to punish minor infractions of military discipline among his troops. Accordingly, the Prosecution submits that his failure to prevent or punish with regard to unlawful conduct on the part of his subordinates did not derive from a lack of capacity to enforce the laws of armed conflict due to the exigencies of warfare.

The cumulative character of the obligation to prevent and punish

125. The obligation to "prevent or punish" does not provide the Accused with two alternative and equally satisfying options. Where the Accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.[90]

iii. VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR (ARTICLES 51 AND 13, ADDITIONAL PROTOCOLS I & II), PUNISHABLE UNDER ARTICLE 3 OF THE STATUTE

126. The Accused is charged in Counts 1, 4 and 7 with violations of the laws or customs of war, punishable under Article 3 of the Statute.

General Conditions for the Applicability of Article 3

27. The Appeals Chamber in the *Tadić* Jurisdiction Decision held that Article 3 is a broad and general clause meant to cover any serious violation of a rule of international humanitarian law, be it treaty based or customary, entailing the individual criminal responsibility of the Accused.[91]

128. The necessary conditions for the application of Article 3 of the Statute, as specified by the Appeals Chamber, are as follows:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

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[90] *Ibid*, para. 336: "where the Accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinate afterwards."
[91] *Tadić* Jurisdiction Decision, para. 89; also *Furundžija* Judgement, paras. 131-133. Given the broad nature of Article 3, the list of violations enumerated in the subsections of Article 3 is illustrative only and any serious violation of any international rule of humanitarian law may be regarded as a crime under this provision if the requisite conditions are met (*ibid*, para. 87).

(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. ....; [and]
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[92]

129. To be regarded as a violation of international humanitarian law, there must be an armed conflict, and a link between the conflict and the criminal conduct alleged.

130. The Appeals Chamber has defined an armed conflict as "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[93]

131. The Appeals Chamber has also stated that the link between the criminal conduct and the armed conflict does not need to be a direct connection,[94] but may be established by demonstrating that the alleged acts were closely related to the armed conflict as a whole.[95]

132. Provided the above conditions are met, it was immaterial to the application of Article 3 whether the violations occurred within the context of an international or internal armed conflict.[96] As the international or non-international nature of the conflict is irrelevant to the charges against the Accused in the present case, the Prosecutor does *not* seek to establish the character of the armed conflict.

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[92] *Tadić* Jurisdiction Decision, para. 94.
[93] *Ibid*, paras. 70, 67-69. With regard to its geographical and temporal scope, the Appeals Chamber further noted that "international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there" (*idem*).
[94] The Appeals Chamber has stated that it "is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." (*Čelebići* Judgement, para. 193 (quoting *Tadić* Jurisdiction Decision, para. 70)). The Trial Chamber in *Blaškić* has stated that this nexus requirement "does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. ... It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict" (para. 69). Both the *Čelebići* and *Tadić* Trial Chambers have stated that it is not necessary, in order to establish a nexus with armed conflict, that a crime "be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict." (*Čelebići* Judgement, para. 195 (quoting *Tadić* Judgement, para. 573)).
[95] In *Furundžija*, the Trial Chamber found sufficient links between the armed conflict and the allegations where it was established that the victim was in the hands of a special unit of the military police, and that the Accused was commander of that unit, an active combatant, and a participant in expelling Muslims from their homes and making arrests (*Furundžija* Judgement, paras. 61-65). Likewise, in *Čelebići*, the Trial Chamber concluded that a nexus existed where the prisoners in the Čelebići prison-camp were detained as a result of the armed conflict, by a party to the conflict, and the criminal conduct was undertaken by the Accused in the performance of their official duties as members of the armed forces. (*Čelebići* Judgement, paras. 193-97).
[96] *Tadić* Jurisdiction Decision, para. 94

Status of Article 51 of Additional Protocol I and Article 13 of Additional Protocol II as Laws or Customs of War

133. The Accused is charged with violations of provisions of the Protocols Additional to the Geneva Convention (Additional Protocols). As set out below, the prohibition on attacks against civilians and the prohibition on inflicting terror upon the civilian population appear at Article 51(2) of Additional Protocol I applicable to international armed conflict[97] and Article 13(2) of Additional Protocol II, applicable to non-international conflict.[98]

134. The Additional Protocols are binding on the parties to the conflict in this case *qua* treaty law, as successor States of the Socialist Federal Republic of Yugoslavia, which ratified the Additional Protocols on 11 June 1979.[99] In 1992, both the Republic of Bosnia-Herzegovina and the Federal Republic of Yugoslavia (FRY) recognised their obligations to comply with the Geneva Conventions and Protocols during the period covered by the Indictment. Moreover, the parties to the conflict in the present case are bound by special agreements concluded on 22 May, 23 May, 6 June and 1 October 1992, at the invitation of the International Committee of the Red Cross, with the aim of finding solutions to humanitarian problems arising from the conflict in Bosnia-Herzegovina.[100]

135. Following the terms of the first of these special agreements concluded on 22 May 1992, the parties to the conflict had agreed to apply a series of rules of international humanitarian law without prejudice to the legal status of the parties to the conflict. Paragraph 2.5 of this Agreement refers to the following rules related to the conduct of hostilities on which the Prosecution relies for Counts 3 and 4: "[h]ostilities shall be conducted in the respect of the laws of armed conflict, particularly in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I."

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[97] Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session) (hereinafter Protocol I)

[98] Second Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (hereinafter Protocol II).

[99] On 31 December 1992, the Republic of Bosnia-Herzegovina deposited its instrument of succession, stating that it became party to the Geneva Conventions and the Protocols with effect from the date of its independence, 6 March 1992. (Bosnia-Herzegovina, Declaration of succession to Geneva Conventions I-IV and Additional Protocols I and II, 31 December 1992 On 27 April, 1992, the Federal Republic of Yugoslavia declared itself the legal successor to the FRY and stated that it shall comply with all of the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally. (Official note of 27 April 1992 from the Permanent Mission of the FRY to the UN to the Secretary General of the United Nations. (Security Council Official Records, 47th Session, Annex, UN Doc. S/23877 (1992))

[100] Agreement No. 1 on the application and the implementation of international humanitarian law within the context of the conflict of Bosnia-Hercegovina, 22 May 1992 (ICRC Archives) (Part of Ex. P786); Agreement No 2 on the Commission consisting of four liaison officers of each party dealing in particular with the exchange of prisoners of war and the evacuation of persons in danger), 23 May 1992 (ICRC Archives) (Part of Ex. P786); Agreement No 3 setting up an ICRC Plan of Action in Bosnia-Herzegovina, 6 June 1992 (ICRC Archives) (Part of Ex. P786); Agreement on the Release and Transfer of

136. The requirements of Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I were thus binding on the VRS and the ABiH, whether the armed conflict is found to have been international or internal in character, since: if the armed conflict was international, the parties to the conflict were bound by Additional Protocol I as a matter of treaty law; or if the armed conflict was internal, the parties to the conflict were bound by these provisions of Additional Protocol I by virtue of the 22 May 1992 special agreement.

137. In addition, as explained below, both the prohibition on attacks against civilians and the prohibition on inflicting terror on the civilian population in Articles 51 and 13 of Additional Protocols I and II reflect customary international law applicable to all armed conflicts, international or non-international in character, at the time the offences material to the present Indictment are alleged to have been committed.

138. Accordingly, the Prosecution charges both Additional Protocols interchangeably, reflecting the fact that attacks against civilians and inflicting terror on the civilian population are unlawful irrespective of the nature of the conflict.[101]

COUNT 1: UNLAWFULLY INFLICTING TERROR UPON CIVILIANS

139. Although infliction of terror on the civilian population is not expressly enumerated in the Statute, it constitutes part of the Laws or Customs of War under Article 3 by virtue of Articles 51(2) and 13(2) of Additional Protocols I and II respectively, which prohibit in identical terms "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".

140. As set forth above, both Articles 51 and 13 of Additional Protocols I and II are binding on the parties to the conflict in this case *qua* treaty law and by virtue of the special agreements concluded at the invitation of the ICRC.

141. Moreover, the provisions reflect customary international law applicable to armed conflicts, international or non-international in character, at the time the offences material to the present Indictment are alleged to have been committed. The prohibition on inflicting terror on civilians is long established, enshrined in international legal instruments as early as 1923[102]

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prisoners, 1 October 1992 (ICRC Archives) (Part of Ex. P786); Recommendation on the Tragic Situation of Civilians in Bosnia-Herzegovina, 1 October 1992 (ICRC Archives) (Part of Ex. P786).

[101] See further *Blaškić* Judgment, para. 161.

[102] As early as 1923, the Hague Air Warfare Rules provided, at Article 22, that *"Aerial bombardment for the purpose of terrorising the civilian population*, of destroying or damaging private property not of a military character, or of injuring non-combatants *is prohibited. (*Draft Rules of Aerial Warfare, prepared in the Hague in 1922). Although the rules "were never

and 1938,[103] recognised in domestic military and penal codes[104] and reflected in multiple UN resolutions[105].

Elements of the offence

142. The Prosecution submits that the offence of unlawfully inflicting terror upon civilians contains the following essential elements:

(1) unlawful acts or threats of violence;
(2) which caused terror to spread among the civilian population;
(3) the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population;
(4) there is a nexus between the acts or threats and an armed conflict, whether international or internal in character; and
(5) the Accused bears individual criminal responsibility for the acts or threats under either Article 7(1) or 7(3) of the Statute.

143. The Prosecution submits that the elements of infliction of terror upon civilians are primarily distinguished from unlawful attack charges set forth below by element (1), which encompasses acts or *threats* of violence, and element (3), which requires that the *actus reus* be executed with the "primary purpose of spreading terror among the civilian population." This special intent requirement is the key distinguishing feature of this crime. It is distinguished also by its effect, which in the present case was the profound psychological impact on the population.

Element One: unlawful acts or threats of violence

144. Articles 51 and 13 encompass "threats" as well as "acts" of violence. The scope of the *actus reus* of the offence of unlawfully inflicting terror upon civilians is accordingly broad.[106] The *acts* of violence consisted of deliberate and systematic shelling and sniping at civilians. The

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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 warfare'." (Schindler & Toman, *The Laws of Armed Conflict*, p. 24, citing Oppenheim & Lauchterpacht, *International Law*, 7th ed., Vol 2, p. 519).

[103] Draft Convention for the Protection of Civilian Populations Against New Engines of War Amsterdam, 1938. Article 4 provides: "Aerial bombardment for the purposes of terrorising the civilian population is expressly prohibited."

[104] See, for example, the Spanish Penal Code 1995, Chapter III "Crimes against the Person and Property Protected en case of Armed Conflict" (Codigo Penal, Ley Organica 10/1995, de 23 de Noviembre, Capitulo III "De los Delitos contra las Personas y Bienes Protegidos en Caso de Conflicto Armado"). Art. 611(1) imposes a sentence of 10 to 15 years for those who "carry out or order indiscriminate attacks or *make the civilian population the object of* attacks, reprisals or *acts or threats of violence whose primary purpose is to terrorise the civilian population*" (unofficial translation).

[105] Indications of the recognition of the terror prohibition around the relevant time can be seen, for example, from Security Council Resolution 941 which condemned Serb forces for "a campaign of terror" in territory under their control. (Security Council Res. 941, UN SCOR, 3428th mtg., at 1-2, pmbl, UN Doc.S/RES/941(1994)). Likewise, the General Assembly condemned the systematic campaign of terror in the former Yugoslavia (UNGA Res. 49/196, ("Situation of Human Rights in the Republic of Bosnia Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia,") 23 Dec. 1994).

[106] *ICRC Commentary*, para. 4785.

nature of the acts and manner in which they were carried out represented a constant *threat* to civilians that, at any moment, they too could be subject to such violence.

Element Two: Terror Spread among the Population

145. The spreading of terror among the civilian population of Sarajevo was an intended consequence of the acts and threat of violence referred to above. There was a climate of extreme psychological fear in Sarajevo during the Indictment period, generated by the unlawful shelling and sniping campaigns, with the result that much of the civilian population lived in a state of terror.

146. Whether or not unlawful acts do in fact spread terror among the civilian population can be proved either directly or inferentially. It can be demonstrated by evidence of the psychological state of civilians at the relevant time,[107] including the civilian population's way of life during the period, and the short and long-term psychological impact of these acts and threats.

147. Although the acts or threat may have been directed against particular persons, the consequences, namely terror, was directed against and felt by the "civilian population".[108] The requirement that terror be spread among the civilian population is satisfied even if certain civilians, or sectors of the population, were not so affected.

Element Three: The Primary Purpose

148. The prohibition in Articles 51(2) and 13(2) of Additional Protocols I and II refers to unlawful acts or threats of violence, the *primary purpose* of which is to spread extreme fear among the civilian population.[109] Although attacks upon legitimate military objectives may in fact cause terror among the civilian population, this would not suffice to make such attacks unlawful. Rather, the Prosecution submits that acts or threats 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. Thus, the prohibition against terror is distinguishable, first and foremost, for this special intent requirement. [110]

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[107] W. Fenrick, "Attacking the Enemy Civilian as a Punishable Offence", *Duke Journal of Comparative and International Law,* Vol. 7. 1997, 539 at 562.
[108] The "civilian population" is defined in Article 50 of Additional Protocol I as comprising "all persons who are civilian."
[109] The dictionary definition of terror is "extreme fear". See also C. Bassiouni, International Criminal Law (2nd ed. 1999) Vol. I (Crimes), p.771, who defines terror as "a general concept of emotionally enhanced fear."
[110] The ICRC Commentary to the Additional Protocols, with reference to the prohibition against inflicting terror against civilians in Article 51(2), similarly acknowledges that "there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to

149. The phrase "primary purpose" requires that the infliction of terror upon the civilian population was the predominant purpose served by the acts or threats of violence. It need not be established that the broader campaign in the Sarajevo theatre had this as its sole or only objective. Accordingly, the fact that other (legitimate) aims may have co-existed simultaneously with the unlawful intent to terrorize the civilian population would not disprove this charge, provided that the intent to inflict terror was principal among these aims.[111]

150. This special intent requirement can be proved both directly or inferentially. The shelling and sniping of civilians was primarily motivated by the intent to terrorize the civilian population of Sarajevo. As noted in relation to the facts above, the primary purpose of inflicting terror can be inferred from the nature, manner, timing, frequency and duration of the shelling and sniping of civilians.

Elements Four and Five, Common to Article 3 Offences

151. The fourth element, concerning the nexus with armed conflict and the fifth element, pertaining to the individual and superior responsibility of the Accused, are set forth above and are applicable, *mutatis mutandis,* to this count.

COUNTS 4 AND 7: UNLAWFUL ATTACKS ON CIVILIANS

152. Counts 4 and 7, laid pursuant to Article 3 of the Statute, charge the Accused with unlawful attacks on civilians, based on Articles 51(2) of Additional Protocol I which applies to international armed conflicts, and Article 13(2) of Additional Protocol II which applies to non-international armed conflicts. Both provide, in identical terms, that: "the civilian population as such, as well as individual civilians, shall not be the object of attack."

153. The unlawful attacks laid under these charges pertain to unlawful attacks on civilians by shelling and sniping carried out by the SRK.

154. The general provisions pertaining to the applicability of the Additional Protocols to the parties to the conflict, set forth above, apply. Moreover, this prohibition on attacks against civilians

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surrender. This is not the sort of terror envisaged here. The provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population..." (*ICRC Commentary,* para. 1940. In similar terms, in relation to Article 13 of Additional Protocol II, the ICRC Commentary confirms that "[as a]ny attack is likely to intimidate the civilian population[, t]he attacks or threats concerned here are therefore those [whose] primary purpose ... is to spread terror" (*ibid,* para. 4786)).

[111] It is also necessary to distinguish, in general terms, between the *intent* of the Accused or his subordinates in this regard and the *motives* for which the unlawful conduct in question may have been carried out (see *supra,* para. 28).

constitutes a norm of customary international law that was, at the time of the commission of the offences, indisputably applicable irrespective of the nature of the conflict.[112]

The Principle of Distinction

155. The prohibition against unlawful attacks is founded upon the bedrock principle underlying international humanitarian law: the principle of distinction. This principle obligates military commanders to direct their operations only against military objectives. The most widely accepted definition of "military objective" is that in Article 52 of Additional Protocol I which states in part:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

156. The cardinal rule of humanitarian law therefore is that civilians and civilian objects must not be the object of attack. Civilians and the civilian population are defined in Article 50, Protocol I, which provides as follows:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1)(2)(3) and (6) of the Third Convention[113] and in Article 43 of this Protocol.[114] In case of doubt whether a person is a civilian, that person shall be considered a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of civilian character.[115]

157. In accordance with the principle of distinction, the following constitute unlawful attacks against the civilian population:

a) attacks deliberately directed against the civilian population as such, whether directed at particular civilian objectives or at civilian areas generally;

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[112] *Kupreškić* Judgement, para. 521 ("The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law"). See also U.N. General Assembly Resolution 2444 (Respect for human rights in armed conflicts) (1968); U.N. General Assembly Resolution 2675 (Basic principles for the protection of civilian populations in armed conflicts); *Tadić* Interlocutory Appeal, para. 127 Moreover, and as mentioned above, all parties to this conflict are bound by both Additional Protocols as a matter of treaty law.

[113] The Third Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949. Article 4(A)(1)(2)(3) and (6) define "members of the armed forces" and others entitled to prisoner of war status.

[114] Article 43 of Protocol I defines 'armed forces.'

[115] Generally, members of the armed forces (who have the right to participate directly in hostilities, and as a corollary, may also be attacked) are considered combatants. To be a combatant, a person must be under a command responsible for the conduct of its subordinates, comply with the rules of international law applicable in armed conflict and distinguish himself or herself from the civilian population while engaged in a military operation. The term "combatant" generally refers to members of the armed forces of a party to the conflict. Members of the reserve or auxiliary forces of a party to the conflict may also be included if they satisfy these criteria. In the absence of specific treaty provision, it is necessary to determine combatant status on a case by case basis. The consequences of a person being a combatant are (1) that combatants may lawfully kill other combatants; (2) combatants are legitimate military objectives and may be lawfully killed by other combatants; and (3) combatants who are captured by the opposing party to the armed conflict become prisoners of war.

b) attacks aimed at military and civilians objectives without distinction; and
c) attacks directed at legitimate objectives, which cause civilian losses clearly disproportionate to the military advantage anticipated.

158. A large, defended city may often present complicated issues of targeting, particularly due to "dual use" facilities and the close inter-mingling of civilian and military elements. Military commanders in combat are nevertheless expected to conduct operations in accordance with core principles of international humanitarian law.

159. The principle of distinction is the single most important principle for the protection of the victims of armed conflict. It formed a core part of JNA/VRS doctrine. The Accused would have been cognisant of the relevant JNA doctrine.

Elements of the offence

160. The essential elements of the crime of unlawful attack on civilians are:

a) an attack resulted in civilian deaths, serious injury to civilians, or a combination thereof;
b) the civilian status of the population or of individual persons killed or seriously injured was known or should have been known;
c) the attack was wilfully directed at the civilian population or individual civilians;
d) there is a nexus between the attack and an armed conflict, whether international or internal in character; and
e) the Accused bears individual criminal responsibility for the attack under either Article 7(1) or 7(3) of the Statute.

Element One: an attack resulted in civilian death or serious injury

161. An attack on civilians falls within Article 3 of the Statute where it causes death or serious injury to body or health, as would be the case if the charge had been laid in accordance with the grave breach provision in Article 85(3) of Protocol I.[116]

162. Moreover, the civilian status of the victims must be established as well as the fact that they were not taking an active part in hostilities when they were killed or seriously injured.[117]

163. The facts of this case, as set out above, indicate that at least a thousand civilians were killed or seriously injured as a result of the campaign of shelling and sniping which is exemplified by the incidents specified in the schedule to the indictment.

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[116] *Blaškić* Judgement, para. 180
[117] Art. 51(3) Additional Protocol I.

Element Two: The civilian status of the victim(s) was known or should have been known

164. The fact that a perpetrator had knowledge of the civilian status of a population or of individual victims can be established either through direct or circumstantial evidence from which it can be inferred that the victims' civilian status should have been known to the perpetrator. This evidence must be evaluated in light of the requirement in Article 50(1) of Additional Protocol I that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian."

165. Factors relevant to establishing the knowledge of a perpetrator include: (1) the physical appearance of the victims, including their gender, age, physical condition, dress, and the character of the objects in their possession or close to them; and (2) the actions of the victims at the time they are killed or injured.

166. All persons who are not combatants and do not take a direct part in hostilities should be protected from attack as civilians. Where visual contact is established, unless the victim is clearly a combatant, such as a member of the armed forces in uniform, the actions of that victim just before being killed or injured will be the decisive factor. When a person does not appear to be a combatant and is not taking a direct part in hostilities, then this person should be regarded as a civilian regardless of gender and age. Thus, men of military age cannot *ipso facto* be assumed to be combatants.

167. The nature and accuracy of sniping is such that the civilian or military character of the sniper's targets would have been known, or should have been known. Indeed the majority of the victims of sniping listed in the Schedule to the Indictment were elderly or minors, whose civilian status would or should have been beyond doubt.

168. Moreover, the activities of the shelling and sniping victims at the time when they were attacked was, or should have been, a strong indicator of their civilian status. As set out in Part I of this Brief, the victims were often engaged in activities of a manifestly civilian character, which could not have occasioned any doubt in the mind of a reasonable military commander or soldier as to their civilian status.

Element Three: The attack was wilfully directed at civilians

169. An attack is wilfully directed against the civilian population if it is directed against civilians deliberately or recklessly.[118]

170. In relation to the sniping attacks, it can be assumed that where sniper fire kills civilians, civilians were in fact their intended target. The question of proportionality does not arise. With regard to the shelling, the facts demonstrate that a) civilians were deliberately targeted as such, b) the attacks were carried out against military and civilian objectives without distinction, or c) if the intended targets were legitimate military objectives, the civilian casualties incurred were clearly disproportionate to the military advantage anticipated.

171. The wilful targeting of civilians is evident from, *inter alia,* the manifestly civilian nature of the targets hit, in certain instances the weaponry employed or the successive number of rounds fired against the target, as well as the scale of attacks and of civilian losses over a prolonged period of time. Moreover, far from meeting the obligation to minimise civilian losses, attacks were carried out at such times and in such a manner as to render excessive civilian casualties virtually inevitable.

Liability of a Commander for Attacks against Civilians

172. The test for determining the liability of the commander is objective, requiring the standard of conduct of a reasonable commander placed in the same circumstances.

173. The obligations of those who decide upon an attack are set out in Article 57(2)(a) of Additional Protocol I, which provides that they shall:

> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from launching any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

174. According to a number of interpretative statements made by States upon ratification of this Additional Protocol, the obligation to take "feasible" steps means to do that which is

practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations.[119]

175. Those who decide upon and order an attack will often do so on the basis of information provided, *inter alia,* by intelligence services and they will not themselves have the opportunity to check the accuracy of such information. They are nevertheless obliged to ensure that the potential target of an attack was properly assessed and in case of doubt as to its nature, they must seek additional information.

176. Therefore, on the basis of the duties of those who plan or decide upon attacks, the Prosecution submits that these duties apply in situations even where a commander may have believed that a target was a legitimate military objective. If he or she launches an attack and the said object turns out to be a civilian object, the commander must be regarded as having acted "wilfully" if he or she had failed to do everything objectively feasible to confirm whether the object of the attack was in fact a legitimate military objective.

Elements Four and Five, Common To Article 3 Offences

177. The fourth element, concerning the nexus with armed conflict, and the fifth element, pertaining to the individual and superior responsibility of the Accused, are set forth above and are applicable, *mutatis mutandis,* to this count.

iv. CRIMES AGAINST HUMANITY: ARTICLE 5 OF THE STATUTE

COUNTS 2, 3, 5 AND 6: MURDER AND INHUMANE ACTS

178. Counts 2, 3, 5 and 6 charge as crimes against humanity harm resulting from the unlawful acts committed during his tenure as commander, including:

(a) murders and inhumane acts committed as a direct result of unlawful attacks on the civilian population by sniping; and
(b) murders and inhumane acts committed as a direct result of unlawful attacks on the civilian population by shelling.

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[118] *ICRC Commentary,* para 3473, defines "wilfully" as encompassing "the concepts of 'wrongful intent' or 'recklessness' *viz.* the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening...."
[119] See Statements of understanding made by Italy (27 February 1986), Canada (20 November 1990) and Germany (14 February 1991) pertaining to Additional Protocol I.

202. Although crimes against humanity were not specifically designed to regulate the conduct of hostilities, the Prosecution submits that under the following circumstances, an Accused may be found guilty of a crime against humanity committed during an attack where:

(a) the attack was unlawful; and
(b) the victim(s) must be persons taking no active part in the hostilities or civilians.

179. Civilians killed during a lawful attack may fall into the category of legitimate collateral casualties. The determination of the unlawful character of an attack is thus critical, as making the legitimate collateral casualties of a lawful attack the victims of crimes against humanity amounts to making lawful combat impossible.

Threshold or common elements of Article 5

180. Crimes against humanity under Article 5 have three essential elements:

(a) The Accused's acts or omissions were committed during an armed conflict, whether international or internal in character;
(b) The Accused's acts or omissions were committed in the context of a widespread or systematic attack against any civilian population;
(c) The Accused's acts or omissions were committed with knowledge that they fit into the broader context of that widespread or systematic attack.

Existence of an armed conflict

181. Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts.[120] With respect to the definition of armed conflict, the test set out by the Appeals Chamber for Article 5 is identical to that required for Article 3, as set forth above.[121]

182. Article 5 does not impose any substantive connection between the crime and the armed conflict.[122]

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[120] *Tadić* Jurisdiction Decision, para. 142.
[121] *Tadić* Judgement, para. 628. See also *Jelisić* Judgement, para. 29.
[122] The Appeals Chamber has stated that under Article 5 "[a] nexus between the Accused's acts and the armed conflict is not required.... The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the statute requires, and in so doing it requires more than does customary international law." (*Tadic* Appeal, 15.7.99, para 251, p.113). The Trial Chamber in *Blaškić* similarly noted that "provided that the perpetrator's act fits into the geographic and temporal context of the conflict, he need not have the intent to participate actively in the armed conflict" (*Blaškić* Judgement, para.71.).

Widespread or systematic attack directed against any civilian population

Definition of "civilian"

183. The Trial Chamber in *Tadić* held that although the definition of "civilians" provided in common Article 3 to the Geneva Conventions and Additional Protocol I, as part of the laws or customs of war, is applicable to crimes against humanity only by analogy, a broad definition of "civilian population" under Article 5 is justified through reference to these sources.[123] This would include, at a minimum, all non-combatants within the meaning of common Article 3(1), i.e., "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".[124]

184. In addition, as stated in Additional Protocol I, "[t]he presence within the civilian population of individuals who do not come within the definition does not deprive the population of its civilian character."[125] Although it is clear that the targeted population must be of a predominantly civilian nature, the presence of certain non-civilians in their midst does not change the character of the population.[126]

Definition of "population"

185. The term "population" does not mean that the entire population of a given State or territory must be victimised in order for the acts to constitute a crime against humanity.[127] The term "population" signifies merely that "the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population."[128]

186. The notion of "population" does not refer to the *ethnicity* of the victims concerned. Furthermore, a discriminatory animus (on the basis of, *inter alia,* ethnicity) on the part of the perpetrators is a requirement as such only of persecution under Article 5(h) of the Statute.

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[123] *Tadić* Judgement, paras. 639-643. See also *Kupreskić* Judgement, para. 547 ("a wide definition of "civilian" and "population" is intended").
[124] See *Jelisić* Judgement, para. 34. Furthermore, it has been held that even individuals who "at one time bore" arms (*Kupreskić* Judgement, para. 548.) and "those actively involved in a resistance movement can qualify as victims of crimes against humanity" (*ibid,* para. 549).
[125] *Additional Protocol I*, Art. 50(3); *see also, Kupreskić* Judgement, para. 549; *Jelisić* Judgement, para. 54.
[126] *Tadić* Judgement, para. 638. The *Jelisić* Judgement adopted this same reasoning. (*Jelisić* Judgement, para. 54).

187. Accordingly, the victims in the present case fall within the ambit of the prohibitions of Articles 5(a) and (i) by virtue of their identifiably civilian character, irrespective of whether they were of Serbian or Muslim ethnicity. Indeed, in the present case, it has been noted that although the majority of victims were Muslims, Croat and Serb civilians that remained in Sarajevo were also targeted as civilians.

"Widespread or systematic attack"

188. In order to constitute a crime against humanity under Article 5, an act must be part of a widespread *or* systematic attack. Thus, the attack may be either widespread or systematic, but it need not be both.[129]

189. However, the "widespread or systematic" requirement does not signify that the acts of the Accused must have a "widespread or systematic" character. Indeed, a single act by a perpetrator, occurring within the context of a widespread or systemic attack against a civilian population, could entail the criminal responsibility of the perpetrator.[130] However, crimes against humanity are intended to imply crimes of a collective nature and thus exclude *random* or *isolated* acts.[131] Thus, criminal acts charged under Article 5 need not be themselves widespread or systematic; they need only be in the context of a larger attack against a civilian population which is of a widespread or systematic nature.

190. The notion of an "attack against the civilian population" is a separate and broader notion than the notion of an armed conflict, although an attack against a "civilian population" may occur during an "armed attack."[132]

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[127] *Jelisić* Judgement, para. 54.
[128] *Tadić* Judgement, para. 644. See also *Prosecutor v. Kordić,* para. 178.
[129] *Tadić* Judgement, para. 646. See also *Akayesu* Judgement, para. 579; *Jelisić* Judgement, para. 53. However, the fact that an attack was widespread could itself be evidence of the systematic nature of the attack (*ibid,* para. 53).
[130] *Kupreškić* Judgement, para. 550.
[131] *Idem.*
[132] *Tadić* Appeals Judgement, para. 214. See also the *Kupreškić* Judgement, para. 749, where the military attack against the civilian population encompassed killings, the infliction of injuries, the burning of houses and the destruction of mosques.

Definition of Widespread

191. The Trial Chamber in the *Tadić* Judgement held that the term "widespread" refers to the number of victims, whereas "systematic" signifies the existence of a pattern or methodical plan.[133] In examining this issue, the Trial Chamber relied on the commentary of the ILC's *Draft Code*, which defines "widespread" as follows:

> The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. . . . The term "large scale" in the present text ... is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of a cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[134]

192. The Trial Chamber in *Akayesu* further defined "widespread" as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[135]

193. In the present case, the scale and tempo of the attacks against civilians, of which the scheduled incidents are but a select few, fully satisfies the widespread requirement.

194. The element of "widespread" does not depend on establishing any requisite geographical range.[136] Nor does this requirement under Article 5 does not mean that the actions of an Accused must themselves be massive, frequent, or involve many victims, only that the surrounding attack is on a large scale.

Definition of Systematic

195. The alternative requirement to "widespread" is that the attack against the civilian population be "systematic." The term "systematic" refers to a pattern of conduct or a methodical plan. It connotes an attack which follows a regular pattern or is conducted with a degree of organisation.

196. The notion of "systematicity" raises the question of whether it is necessary to prove that a policy or plan is behind an attack under crimes against humanity or whether the proof of any

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[133] *Tadić* Judgement, para. 648.
[134] ILC *Draft Code*, pp. 94-95.
[135] *Akayesu* Judgement, para. 580.
[136] The *Blaškić* Judgement held that a crime may be widespread or committed on a large scale by "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude" (para. 206).

plan or policy is but one manner to demonstrate the systematic character of the attack. The issue is not consistently articulated in the Tribunal's jurisprudence.[137] It is nevertheless clear that any such a policy does not have to be explicitly formulated, nor need it be the policy of a State.[138]

197. A crime against humanity thus need not be part of policy or practice officially endorsed or tolerated by one of the parties to the conflict nor must the act be in actual furtherance of a policy associated with the conduct of the war or in the actual interest of a party to the conflict.[139] Accordingly, evidence of a "policy" emanating from either a State or a non-State entity would suffice, as would a policy of acquiescence or tolerance as opposed to an overt or preconceived plan or policy of directing such attacks to be committed.

198. It is also unnecessary to demonstrate that an Accused personally took part in the formulation of such a policy or practice.[140] Perpetrators of crimes against humanity can therefore be individuals "having neither official status nor acting on behalf of a governmental authority."[141]

199. While the requirements are disjunctive, an evidentiary overlap may arise in the proof of the "widespread or systematic" requirement. The fact that an attack was widespread could itself be evidence of the systematic nature of the attack.[142] Indeed, in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation.[143]

)0. In the present case, the degree and duration of shelling and sniping indicate an attack that was systematic as well as widespread.

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[137] Some Trial Chambers interpret the element of systematic as requiring a policy element, although each Trial Chamber concurs that systematic and widespread remain disjunctive, thus arguably proof of a plan or policy is a necessary element of crimes against humanity only when opting to establish that an attack was systematic. (See for example the *Tadić* judgment, paras. 653 *et seq.*; *Kupreškić* Judgment, paras. 551-555; *Kayishema* judgment, para. 124). Other Trial Chambers refrain from imposing the burden of proving a policy or plan as a general requirement of crimes against humanity but appear to have taken cognizance of it as a means of proving systematicity. (*Blaškić* Judgement, para. 203).

[138] Instead, it is sufficient that the policy be that of an entity which has *de facto* control over, or whose forces are capable of moving freely within, a defined territory. (*Tadić* Judgement, paras. 654-655). See also *Kupreškić* Judgement, para. 551.

[139] *Blaškić* judgment, para. 70. The *Tadić* Trial Chamber in this regard also recognised that such a policy need not be formalised and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalised or not. (*Tadić* Judgement, para. 653).

[140] *Blaškić* judgment, para. 625.

[141] *Ibid,* para. 555.

Requisite *mens rea*

201. Crimes against humanity require proof that the Accused:

a) had the specific intent to commit the underlying offence and
b) had awareness of the broader context into which this crime fits; ie. knowledge that the offences are part of a widespread or systematic attack against a civilian population.

202. The Accused's acts must comprise part of a pattern of widespread or systematic crimes and the Accused must have known that his acts fit into such a pattern.[144] As above, the Accused's *motives* for committing the crimes in question, as opposed to his knowledge of the context into which is offending falls, are irrelevant.

203. Knowledge of the attack may be actual or constructive and may be implied from the totality of circumstances or from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred; scope and gravity of the acts perpetrated, or the nature of the crimes committed and the degree to which they are common knowledge.[145]

204. This knowledge requirement is satisfied where the Accused was either aware of, or wilfully blind to, the facts or circumstances that link his or her acts with the broader context of an attack against the civilian population, or where the Accused knowingly "took the risk of participating in the implementation of that context."[146]

Enumerated Acts

205. In addition to the general requirements applying to all crimes against humanity charged under Article 5, outlined above, it must be shown beyond a reasonable doubt that the Accused or a subordinate was criminally responsible for one of the acts enumerated thereunder. In the present case, the Accused is charged with murder and inhumane acts under paragraphs 5(a) and 5(i) respectively.

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[142] *Jelisić* Judgement, para. 53.
[143] *Blaškić*Judgement, para. 207.
[144] *Tadić* Appeals Judgment, para. 248. It is this knowledge of the larger context, and the inclusion of the Accused's act into that context, which transforms ordinary acts into crimes against humanity and which provides the justification for the imposition of added culpability (*Kayeshima* judgment, para. 133; *Kupreškić* judgment, para. 624).
[145] It is unnecessary in this regard to prove that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy to commit it. However, he or she must be aware that his or her act would contribute to the attack on the civilian population (or be wilfully blind to this likelihood). Nor need he be fully aware of all the specific consequences of his action. It is sufficient for him to have been aware of the risk that his action might bring about serious

COUNTS 2 AND 5: MURDER

206. Murder as a crime against humanity under Article 5(a) of the Statute covers cases where the death of a civilian or other person included in the applicable victim group is the result of unlawful acts or omissions. Murder under Article 5 has been defined as the unlawful, intentional killing of a human being.[147]

207. Aside from the general elements to crimes against humanity listed above, the essential elements of murder under Article 5(a) of the Statute are:

a) The occurrence of unlawful acts or omissions causing death; and
b) The fact that these acts or omissions were committed wilfully.

208. The first element of this crime, which is common to homicides of all kinds, consists of the death of a person or persons as a result of the conduct of the perpetrator. It is well established that conduct consisting of omissions, rather than positive acts, may in some cases satisfy this element.[148] The evidence in this case will show many deaths resulting from the unlawful attacks in question.

209. As to the second element of this crime, the legal meaning of the expression "wilfully", when applied to the crime of wilful killing, means that the perpetrator either intended to cause the death of the victim or that the perpetrator was aware of the substantial likelihood that the death of the victim would be the consequence of his or her conduct, and in all the circumstances acted with "extreme indifference" towards that possibility. Hence, the death of a protected person cannot be completely accidental. In the present case, the Accused intended death to result, or knew that death would be the likely result, of the acts of shelling and sniping for which he was responsible under Article 7(1) and 7(3).

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consequences for the victim, or be wilfully blind to this eventuality. (*Tadić* Judgment, para. 659; *Kupreškić* Judgment, para. 557; *Kayishema* Judgment para. 134; *Blaškić*, para. 259).

[146] *Blaš*kić Judgment, para. 251.

[147] See *Akayesu* Judgement, paras. 589-590, which outlined the requisite elements of murder as follows: (a) the victim is dead; (b) the death resulted from an unlawful act or omission of the Accused or a subordinate; (c) at the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not. For substantially similar formulations, see also the *Kupreškić* Judgement, paras. 560-61and the *Jelisić* Judgement, paras. 35, 51.

[148] Jean Pictet (ed.), *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Convention IV, (ICRC, Geneva, 1958) Art. 147, p. 597; *Čelebići* Judgement, para. 424.

COUNTS 3 AND 6: INHUMANE ACTS

210. With regard to the enumerated incidents of shelling and sniping which resulted in suffering and injury rather than death, the Prosecution submits that these acts constitute "inhumane acts" punishable under Article 5(i) of the Statute.

211. Article 5(i) of the Statute ensures that any act which is inhumane in nature and character may constitute a crime against humanity, if it is of similar gravity to the crimes enumerated in Article 5(a) to (h), provided the other elements are met.[149]

212. The essential elements of inhumane acts as a crime against humanity under Article 5(i) of the Statute are:

a) The occurrence of acts or omissions causing serious mental or physical suffering or injury or which constitute a serious attack on human dignity; and
b) The acts or omissions were committed wilfully.

213. This residual category of acts has not been exhaustively defined. However, inhumane acts must, as a minimum, consist of acts causing injury to a human being in terms of physical or mental integrity, health, or human dignity, and must be of a serious nature.[150] As set out in Part I, the shelling and sniping caused not only great physical injury but extensive and acute mental suffering to the victims. The facts relating to the impact on victims, and the extreme measures that the population adopted for its own survival, demonstrate the extent to which the unlawful acts, and the manner in which they were carried out, constituted an attack on human dignity.

214. As with murder as a crime against humanity, the general, threshold elements of crimes against humanity must also be established, as set forth above.

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[149] *Akayesu* Judgement, p. 237, para. 585; *Kayishema and Ruzindana* Judgement, paras. 149-151. Such acts were defined in the *Tadić* Judgement, citing the ILC *Draft Code* as authority, as acts which "must in fact cause injury to a human being in terns of physical or mental integrity, health or human dignity." (*Tadić* Judgement, para. 729 (citing ILC *Draft Code*, p. 103)). This category of acts is intended to include only additional acts that are similar in gravity to those listed in paragraphs (a) to (h) of Article 5 (*idem*). This definition of inhumane acts is also entirely consistent with the definition of inhuman treatment punishable under Article 2(b) of the Statute which was considered in the *Čelebići* Judgement, where the Trial Chamber concluded that "inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental of physical suffering or injury or constitutes a serious attack on human dignity" (*Čelebići* Judgement, paras. 512-545 at 543. See also the *Jelisić* Judgement, para. 52).
[150] *Tadić* Judgement, paras. 727-730; *Kayishema and Ruzindana* Judgement, para. 151.

v. CONCURRENCE OF OFFENCES

215. There is no impermissible concurrence of offences in the present case.

vi. *TU QUOQUE* AND REPRISALS

216. In international law, there is no defence for attacks on civilians on the basis of the so-called *tu quoque* principle.[151] This reflects the sacrosanct nature of the prohibition of attacks against the civilian population[152] and the general notion that individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.[153] Accordingly, any attempt by the Accused to justify conduct such as that impugned in the Indictment on the grounds that offences of a similar character may have been committed against civilians by another party to the conflict has no basis in law.

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Dated this 23rd day of October 2001
The Hague,
The Netherlands

[151] Under this principle, a belligerent seeks to justify its crimes on the grounds that an adversary is committing similar crimes. However, this Tribunal has emphatically acknowledged that this principle can never stand as a justification for the perpetration by an Accused of serious violations of international humanitarian law. (See *inter alia, Kupreškić* Judgement, paras. 765, 515-536 and *Prosecutor v. Martić,* Rule 61 Decision, Case No. IT-95-11-I, 8 March 1996, paras. 15-17). The Prosecution further notes the exceptionally limited scope of the notion of reprisals in the light of contemporary international humanitarian law (*Kupreškić* Judgement, paras. 527-536).
[152] See *inter alia* Additional Protocol I of the Four Geneva Conventions of 1949, Article 51(2) ("The civilian population … shall not be the object of attack") and (6) ("Attacks against the civilian population … by way of reprisals are prohibited").
[153] See *inter alia* Common Article 1 of the Four Geneva Conventions ("The High Contracting parties undertake to respect … the Present Convention *in all circumstances* …") and Art. 51(8) of Additional Protocol I ("Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population").