



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-98-29-T
Date: 5 December 2003
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IN TRIAL CHAMBER I

Before: Judge Alphons Orié
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr. Hans Holthuis

Judgement Of: 5 December 2003

PROSECUTOR

v.

STANISLAV GALIĆ

**SEPARATE AND PARTIALLY DISSENTING OPINION OF
JUDGE NIETO-NAVIA**

The Office of the Prosecutor:

Mr. Mark Ierace
Mr. Chester Stamp
Mr. Daryl Mundis
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How do you get inside to a target that is surrounded by non-combatants? It is a soldier's worst nightmare.

Colonel David Fraser, UN representative posted in Sarajevo in 1994¹

A. Introduction

1. I append a separate and dissenting opinion because I wish to review facts in evidence regarding the conflict not mentioned in the Judgment and would like to explain the reasons for my many disagreements with the factual and legal conclusions reached by a majority of the Trial Chamber.

2. I begin by reviewing facts of importance in understanding the context of the conflict in Sarajevo during the Indictment Period. I will then explain why I disagree with conclusions found in the Judgment regarding certain incidents involving civilians and why I conclude that the evidence does not establish that the SRK waged a campaign of purposefully targeting civilians throughout the Indictment Period. Finally, I will discuss the law applicable to this case and present my conclusions concerning the appropriate legal findings.

B. Preliminary remarks regarding the conflict in Sarajevo

1. The position of forces

3. The conflict began in early April 1992 and continued beyond the Indictment period. With very exceptions the confrontation lines separating the SRK from the ABiH remained the same throughout the Indictment Period. The fighting which resulted in the most damage² took place mainly at the confrontation lines in 1992.³ The VRS and the SRK occupied from the beginning of the conflict many of the hills overlooking the city, though not all of them. For example, Mount Igman was placed officially under UN control but ABiH troops occupied parts of that elevation at various points during the conflict.⁴

2. Available weapons

4. Both parties to the conflict took advantage of the chaotic conditions during the first months of 1992 to seize weapons such as pistols and mortars left behind in military barracks after the JNA

¹ Fraser, T. 11238.

² Witness DP11, T. 11019 - 11020; Witness DP13, T. 15873.

³ Witness Y, T. 10940; Abdel-Razek, T. 11615; Kacalin, T. 13686 - 13688; Witness DP2, T. 17048 - 17049; Witness DP10, T. 14319 and 14331; Tsynchenko, T. 17232; Witness DP2, T. 17048.

⁴ Hermer, T. 8482 - 8484.

departed from the city.⁵ The evidence indicates that, prior to April 1992, there was a factory manufacturing optical sights for rifles in Sarajevo which may have continued to operate during the conflict.⁶ It appears that there had been specialised sniping units within the JNA and that both the ABiH and the SRK had taken possession of some of their special rifles. The Trial Record contains very little evidence though indicating that the SRK used these specialised weapons during the conflict.⁷ Furthermore, SRK soldiers appearing before the Trial Chamber explained that they were not aware of sniper units operating within the SRK⁸ and no evidence was tendered indicating that such weapons had been used in specific incidents during the Indictment Period.⁹ After the explosion in Markale market on 5 February 1994, a Total Exclusion Zone (TEZ) was established in the city and the SRK's heavy weapons were moved 20 kilometres away from Sarajevo, where they were placed under the supervision of the UN.¹⁰

3. The role of UNMOs

5. The UN was present in Sarajevo during the conflict through UNPROFOR¹¹ and UNMO representatives. Although UNMOs were charged with monitoring military exchanges between both belligerents, they concentrated their surveillance in practice on the SRK by setting up a greater number of observation posts along the SRK confrontation line than within the city.¹² It was difficult for the UNMOs to accomplish their task effectively since they were understaffed.¹³ Their mission was further complicated by the use made by the ABiH of mobile mortars.¹⁴ As a result,

⁵ Vuković, T. 14613 - 14630; Witness DP5, T. 15241 - 15246; Witness DP30, T. 16979 - 16980 and 17014 - 17015; Witness DP36, T. 18035 - 18036 and 18040; Bukva, T. 18324.

⁶ Sablija, T. 5383.

⁷ Witness DP9, T. 14534 - 14535; Vuković, T. 14678; Witness DP30, T. 17112; Witness D, T. 1928 - 1934; Van Lynden, T. 2107 - 2108.

⁸ Witness DP35, T. 17505 and 17569; Witness DP 34, T. 17909; Bukva, T. 18451.

⁹ The issue of the accuracy of the rifles in use in the former Yugoslavia arose with respect to the Prosecution's allegations that civilians were sniped at in Sarajevo. According to one source, the maximum range of a standard rifle was approximately 600 metres, while its optimum range lay somewhere between 100 and 300 metres. Ex. P3675 (Report on the weaponry used in the former Yugoslavia by Canadian officer Tetsuo Itani) at p. 7. By comparison, machine guns can be effective up to a range of 1200 metres. Ex. P3675 (Report on the weaponry used in the former Yugoslavia by Canadian officer Tetsuo Itani) at p. 7. Another source stated that an experienced sniper would easily be able to hit a target from a distance of 200 metres with either a standard or a special sniping rifle. Hinchliffe, T. 12938 and 13022 - 13023.

¹⁰ Van Baal, T. 11331 - 11332. There is little evidence indicating what happened to the ABiH's heavy weapons after the TEZ was established. One UN representative believed that some of these weapons had been hidden and were only occasionally used. Van Baal, T. 11332 and 11342.

¹¹ The UN Protection Force or UNPROFOR were charged by the UN Security Council with the task of "creating conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis." UN Security Council resolution 721 dated 21 February 1992.

¹² In December 1992, there were 7 or 8 such posts monitoring SRK-controlled territory, which increased to 11 by June 1993 before falling to 6 or 7 by September 1993. Cutler, T. 8899 - 8900; Gardemeister, T. 8976. By comparison, there were between 3 and 6 UNMO observation posts monitoring ABiH-controlled territory in the city. Cutler, T. 8899 - 8900; Gardemeister, T. 8970.

¹³ Cutler, T. 8901; Carswell, T. 8330.

¹⁴ Mole, T. 11062.

discrepancies between UNMO reports about observed military exchanges were relatively frequent.¹⁵

4. Paramilitary groups and other armed units

6. Paramilitary groups which were under the control of neither the ABiH nor of the SRK operated both within and outside of the city. Some of these paramilitary groups inside the city “were terrorising civilians in certain areas and carrying out attacks.”¹⁶ One particular group was headed by Juka Prazina and was a concern to the BiH authorities.¹⁷ It was not disbanded until 1993, when its leader was executed by the ABiH.¹⁸ There is also evidence suggesting that Sarajevo was shelled by a Croatian unit from within the city itself on at least one occasion when the relationship between the ABiH and the HVO Croatian forces had deteriorated.¹⁹

5. Living conditions within the city

7. The evidence indicates that the SRK permitted humanitarian aid and buses transporting civilians who wished to leave the city to pass through its check-points.²⁰ Secure corridors, otherwise known as “blue roads,” were established to allow humanitarian convoys and civilians to enter the city.²¹ Inspectors were posted along these roads to check that humanitarian convoys were not used to smuggle military equipment.²² The evidence suggests though that some of these convoys, which were escorted by armoured personnel carriers belonging to the UNHCR, were misused to transport weapons and ammunition into the city.²³

8. Although Sarajevo was the focal point of an ongoing war, the Trial Record does not disclose that the population within the city suffered from widespread starvation or a generalized shortage of

¹⁵ Witness Y, T. 10953.

¹⁶ Tucker, T. 9988.

¹⁷ Juka Prazina headed a group consisting of up to 200 men positioned in the area of Novi Grad. Sokolar, T. 3638; Karavelić, T. 11923. A senior UN representative described Juka Prazina as a “criminal” and that the “[BiH] Presidency forces had concerns about this [individual’s] activities.” Mole, T. 11084.

¹⁸ Karavelić, T. 11928. The Prosecution disclosed pursuant to Rule 68 on 18 November 2003 additional information which had been in its possession since 22 May 2002 and which indicated the existence of a group known as “Ševe.” Ševe was a special unit of the BH MUP which launched attacks not only against Serbian and Croatian forces but also against Bosnian authorities whose positions it disagreed with. In one instance, this group attempted to assassinate with an explosive device Sefer Halilović, the head of the ABiH headquarters, killing his wife and her brother. Officially, blame for this incident was laid on Serbian forces by a BH team of investigators. See material disclosed by the Prosecution on 18 November 2003 at E 0176-0453-0176-0460 (this material was not tendered into evidence).

¹⁹ See interview disclosed by the Prosecution pursuant to Rule 68 on 1 August 2003 at ETV1000-120 Tape 1. See also Witness Y, T. 10950 regarding the deterioration of relations between Muslims and Croats.

²⁰ Indić, T. 18577. See also Ex. D1491.1 (English translation of SRK written order), Ex. D1492.1 (English translation of SRK written order), Ex. D1493.1 (English translation of SRK written order), Ex. D1494.1 (English translation of SRK written order). See also Witness L, T. 2539; Kolp, T. 8227 and Krsman, T. 19073 – 19075 regarding the distribution of humanitarian aid within the city.

²¹ See for example, Witness AH, T. 6267 and 6346.

²² Indić, T. 18648 - 18649.

²³ Witness DP17, T. 16741 – 16750; Witness DP36, T. 18057. See also Abdel-Razek, T. 11633 and Henneberry, T. 8626 regarding allegations made by the SRK about the misuse of these convoys.

medicine.²⁴ There were some problems with access to running water and electricity because of damage done by the fighting to power lines and water pipes. According to one UN representative, certain local BiH leaders delayed needed repairs of the utility networks in order to attract international sympathy.²⁵ It appears though that in areas under the effective control of the BiH Presidency, utilities were repaired promptly.²⁶ Furthermore, there is no evidence establishing that the SRK obstructed these repairs or wilfully interrupted the water or electric supply. On one occasion, the supply of electricity was interrupted for three months because both the ABiH and the SRK would not guarantee the safety of repair teams who needed access to power lines near the confrontation lines.²⁷ The Trial Record also discloses that a number of civilians wishing to escape from the city and its living conditions were blocked by the ABiH in order to preserve the morale of troops.²⁸

6. The difficulty of waging war in the urban environment of Sarajevo

(a) Sizeable ABiH presence inside the city

9. The evidence reveals the difficulties faced by a commander in avoiding civilian casualties when waging a war in the urban context of Sarajevo. The ABiH had posted during the conflict approximately 45,000 troops inside the city,²⁹ representing a sizeable minority of Sarajevo's estimated 340,000 inhabitants.³⁰ This dense military presence inside the city significantly increased the likelihood of harming nearby civilians when attacking ABiH targets, particularly when available weapons such as mortars were used.³¹ As a UN representative explained, waging war under these circumstances is "a soldier's worst nightmare."³² Another UN representative concurred, testifying that "two parties are waging war [in the city] and both are using artillery and mortar. I think that it is impossible, with what I experienced there, to avoid certain civilian neighbourhoods."³³

²⁴ Tucker, T. 10030; Ex. D136 (UNMO briefing dated 16 November 1993). According to John Ashton, an international observer who had curiously seen very few ABiH forces within the city, a number of old persons were "literally dying of malnutrition because they were too terrified to come out." Ashton, T. 1215 and 1371. A doctor at Sarajevo's State Hospital also explained that his facility had an insufficient supply of medicine. Mandilović T. 1017 – 1021 and 1101.

²⁵ Tucker, T. 10030. A Serbian civilian living in the city remembered that he had heard that the ABiH manipulated the supplies of water and electricity in order to provoke an outside intervention. Witness DP1, T. 13300.

²⁶ Tucker, T. 10030.

²⁷ Radojević, T. 15597 - 15598.

²⁸ Mole, T. 10949 and 11094; Guskova, T. 19489.

²⁹ Karavelić, T. 11787.

³⁰ The exact number of persons living in Sarajevo during the Indictment Period is not known. The estimate of 340,000 residents originates from an extensive survey conducted in 1994 in the city. See Ex. P3731 (Expert report by Ewa Tabeau and others) at p. 2.

³¹ See for example Ex. D1913 (Map prepared by Defence military expert) for an illustration of the number possible military targets within the city.

³² Fraser, T. 11238.

³³ Briquemont, T. 10086.

10. The SRK also encountered difficulties in distinguishing between military and civilian targets. ABiH troops inside the city were not always uniformed during the Indictment Period.³⁴ Furthermore, attacks were launched against the SRK from mobile mortars positioned in civilian areas of Sarajevo³⁵ and the ABiH sheltered military resources in civilian areas,³⁶ including in civilian buildings³⁷ and in the immediate vicinity of the Koševo hospital in Sarajevo.³⁸ It also made use of available vehicles in the city,³⁹ including those belonging to civilians,⁴⁰ to transport military assets without systematically identifying these trucks and cars as belonging to the military.⁴¹

(b) Attacks launched against the SRK from protected facilities

11. The ABiH fired from within and from the immediate vicinity of civilian facilities. For example, mortars were fired from the grounds of the Koševo hospital,⁴² whose medical supply line was also misused for the purpose of replenishing military stocks of gunpowder and fuses.⁴³ Tank and mortar attacks were launched against the SRK from the immediate vicinity of the PTT building, which was occupied by UN personnel.⁴⁴ The evidence also suggests that SRK positions may have been fired upon from schools, places of worship and cemeteries in the city.⁴⁵

(c) Violations of cease-fires and other agreements

12. Both armies concluded under UN auspices a number of cease-fire agreements, which were broken subsequently by both parties.⁴⁶ SRK soldiers believed though that their ABiH counterparts breached these agreements more frequently than they themselves had,⁴⁷ perhaps because ABiH soldiers felt that the demilitarisation of Sarajevo would lead to a defeat of their army.⁴⁸

³⁴ At the beginning of the conflict, only a few people wore uniforms. Jusović, T. 4208; Harding, T. 4317 and 4448; Tucker, T. 9954; Hermer, T. 8492-3; Witness W, 9630 - 9631; Witness DP53, T. 16145 - 16148. As late as 1994 and 1995, some soldiers still wore civilian clothes. Fraser T. 11233. The Prosecution has acknowledged that the ABiH did not have proper uniforms in the first months of the conflict. T. 9631 - 9632.

³⁵ Magnusson, T. 8157.

³⁶ Abdel Razek, T. 11329 - 11331 and 11627. Between July and November 1992, a UNPROFOR representative received 4 to 6 reports that the ABiH had posted military equipment close to civilian buildings. Magnusson, T. 8165.

³⁷ Abdel Razek, T. 11619; Hadzić, T. 12366 - 12367.

³⁸ Witness DP51, T. 13590 - 13592 and 13607 - 13608. See also Witness DP51, T. 13589 - 13590; Witness DP34, T. 17825 - 17826. There is also conflicting evidence suggesting that the PTT building, which was used by UN personnel, may have housed an ammunition factory operated by the ABiH. Compare Abdel-Razek, T. 11587 with Magnusson, T. 8145 and 8162; Mole, T. 11069 and 11129; Witness Y, T. 10957.

³⁹ Briquemont, T. 10135; Tucker, T. 9970.

⁴⁰ Karavelić, T. 11887. See also Sablijca, T. 5423.

⁴¹ Mole, T. 11110; Tucker, T. 9970.

⁴² See para. 504 - 506 of Judgment.

⁴³ Lazić, T. 13779 - 13780, 13792, 13796 and 13839; Carswell, T. 8388; Ex. D1758/3 (Video footage of oxygen bottles found at Ilidža hospital). See also Ex. P752 (UNMO report for the month of January 1993) which states that on 24 January 1993, "UNMOS [monitoring SRK-controlled territory] were called to the BLAZUJ hospital to witness that two of the oxygen bottles delivered by the UNHCR were found to contain gunpowder."

⁴⁴ Magnusson, T. 8146; Abdel-Razek, T. 11588; Gardemeister, T. 8964.

⁴⁵ Mole, T. 11150; Witness AD, T. 10687.

⁴⁶ Mole, T. 11058 - 11061.

⁴⁷ Bukva, T. 18370; Witness DP19, T. 16414 - 16415.

⁴⁸ Indić, T. 18595 - 18597.

13. As noted in the Judgment, the SRK agreed to turn over control of the airport to the UN to allow for the delivery of humanitarian supplies.⁴⁹ After the SRK relinquished this control, individuals began to cross the runway frequently in order to enter and leave the city.⁵⁰ Most of those entering the city through the airport were soldiers⁵¹ and the French UN battalion charged with policing the area was unable to carry out its task effectively.⁵² It did not, for example, stop the smuggling of weapons into the city.⁵³ A UN representative added that on one occasion, a senior BiH official met secretly with Turkish government officials at the airport.⁵⁴ The SRK repeatedly launched protests with the UN about such misuse of the airport⁵⁵ and ultimately decided to open fire with small arms in the area of the airport to stop further violations of its agreement with the UN.⁵⁶ Such fire was opened particularly in instances when SRK positions were first attacked⁵⁷ and was aimed mostly at ABiH troops located around the airport.⁵⁸

14. Not all fire in the area of the airport originated from the SRK. The airport itself was occasionally shelled by the ABiH⁵⁹ and, in one instance, the airport control tower appears to have been targeted by a heavy weapon from an ABiH position located on Mount Igman.⁶⁰ The situation at the airport was therefore “complex,”⁶¹ and, as explained by a senior UN representative, it was difficult to determine the party responsible for launching attacks in that area.⁶²

7. Attacks on civilian targets

15. Civilians in both SRK and ABiH-controlled parts of the city were harmed during the conflict. Furthermore, complaints were lodged with both the SRK and the ABiH regarding the targeting of civilians with mortars or heavy weaponry.⁶³ The evidence from UN representatives

⁴⁹ Para. 411 of Judgment.

⁵⁰ Para. 412 of Judgment.

⁵¹ Witness W, T. 9633. In addition, some of these soldiers entering the city through the airport wore civilian clothes. Witness Y, T. 10870. ABiH general Vahid Karavelić believed that the majority of the persons crossing the runway at the airport were civilians and other individuals high-ranking Bosnian officers. Karavelić, T. 11877. His testimony is contradicted though by other evidence to the effect that the ABiH prevented civilians from leaving the city. See para. 8 of this Opinion.

⁵² Tucker, T. 9931.

⁵³ Abdel-Razek, T. 11594.

⁵⁴ Tucker, T. 9935 – 9937. This BiH official had subsequently attempted to return to the city in a UN armoured vehicle, but was killed in a skirmish with the SRK on his way back. Tucker, T. 9937.

⁵⁵ Para. 413 of Judgment.

⁵⁶ Para. 413 of Judgment.

⁵⁷ Witness DP35, T. 17595.

⁵⁸ Witness W, T. 9556 - 9557.

⁵⁹ Cutler, T. 8937 and 9008; Van Baal, T. 11385; Mole, T. 11097; Bergeron, T. 11280.

⁶⁰ Witness DP35, T. 17504.

⁶¹ Para. 411 of Judgment.

⁶² Abdel-Razek, T. 11641.

⁶³ Tucker, T. 9896.

posted in Sarajevo also strongly suggests that the ABiH at times attacked civilians in parts of the city under its control.⁶⁴

8. Role of the media

16. The media played a pivotal role in the conflict because of the manner in which it reported on the situation in Sarajevo. The evidence establishes that the press at times unfairly singled out Serbian military forces for blame. For example, BBC News reported on one occasion that Serbian forces were shelling the airport when UN representatives had observed that this fire originated from ABiH positions on Mount Igman.⁶⁵ The information reported by the press was particularly important since many UN assessments of the situation in the city relied, at least in part, on these news sources.⁶⁶ A senior UN representative posted in the city had concluded that the Muslim population “had the entire world press on their side so that [the ABiH sometimes launched attacks against the SRK in order to draw counter-fire] ... in order to create an unfavourable image of the Serbs,”⁶⁷ adding that reports from UN observers contributed to this negative image.⁶⁸ Another senior UN representative remembered witnessing a particular incident during which he had concluded that the ABiH had staged an attack on the BiH Presidency during the visit of a British official to draw international attention.⁶⁹ Other senior UN observers echoed this sentiment, explaining that they felt that the media regarded the ABiH as the beleaguered party.⁷⁰ This media spotlight governed to a certain extent the SRK’s conduct during the conflict.⁷¹

⁶⁴ Tucker, T. 9943 and 10026; Henneberry, T. 8687, 8734 – 8739 and 8764 - 8765; Mole, T. 10997 - 10998. Furthermore, certain attacks launched against UN facilities such as the PTT building appeared to come from within ABiH-controlled territory. Henneberry, T. 8649 - 8653 and 8685.

⁶⁵ Henneberry, T. 8644. One SRK soldier also remembered that he was grossly misquoted by a journalist in an interview published in a popular weekly magazine. Witness AD, T. 10704 - 10706. This same soldier further alleged that he knew of another example where the press had published the picture of a woman holding the skull of her son, describing her as being Muslim when she was actually Serbian. Witness AD, T. 10709. See also Bukva, T. 18450 regarding the inaccuracy of the reporting of the international news media.

⁶⁶ See for example Ex. D133 ((UN report of military activity taking place on 5 January 1993) which states that, according to the Reuters news agency, the areas of Novi Grad, Stari Grad and Hrasno were shelled on 5 January 1993. See also Ex. D134 (UN report of military activity taking place on 24 December 1992) which indicates that a number of shells exploded in the city on 24 December 1992 and identifies areas affected by this shelling based on information provided by The New York Times and United Press International.

UN reports of the situation in Sarajevo also relied on information provided by BiH sources. See for example Ex. D132 (UN report of military activity taking place on 7 January 1993) and Ex. D133 (UN report of military activity taking place on 5 January 1993) which rely on figures provided by the BiH ministry of public health for estimating the number of casualties in the city on 5 and 7 January 1993.

⁶⁷ O’Keefe, T. 9238 – 9239. See also Gray, T. 19925.

⁶⁸ O’Keefe, T. 9239.

⁶⁹ Gray, T. 20130.

⁷⁰ Mole, T. 10996 - 10998; Henneberry, T. 8764.

⁷¹ For example, a senior UN representative explained that in one instance the UN had successfully halted an SRK shelling attack by threatening to disclose it to the media. Abdel-Razek, T. 11588 - 11589.

C. Scheduled and unscheduled incidents

1. Introductory observation regarding the assessment of the evidence

17. The principle of *in dubio pro reo* is one of the foundational precepts of criminal law which can be found in domestic and international legal systems as well in the jurisprudence of the Tribunal.⁷² According to this principle, the Prosecution must prove a fact aimed at a conviction beyond a reasonable doubt. I indicated to the Majority my concerns and doubts about the evidence relating to 8 out of 23 scheduled sniping incidents, 3 out of 5 scheduled shelling incidents as well as certain unscheduled incidents.⁷³ I considered these doubts to be reasonable. I had expected this plural Trial Chamber to accept my doubts as sufficient to establish that the Prosecution has failed to prove an allegation beyond a reasonable doubt. The Majority did not share this expectation and I have been obliged to express separately my disagreement with its assessment of the evidence.

18. Furthermore, I observe that no witness appearing before the Trial Chamber saw those who fired the bullets or mortar shells responsible for the incidents discussed below and SRK soldiers repeatedly testified that they had not targeted civilians in ABiH-controlled territory deliberately. The Prosecution claims, nonetheless, that these incidents resulted from the deliberate actions of SRK soldiers based on evidence describing the circumstances of these events. I have been mindful of the limitations of such evidence in light of the ongoing conflict in Sarajevo when considering the alleged attacks on civilians discussed below.

2. Scheduled sniping incident 2

19. The Majority finds that “Anisa Pita was targeted deliberately”⁷⁴ on 13 December 1992 as she was untying her shoes at the entrance of her house.⁷⁵ Although I could share in the conclusion that Anisa Pita, a civilian, was injured by a bullet on 13 December 1992,⁷⁶ I respectfully dissent from the Majority’s finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that this projectile was fired deliberately at the victim from an SRK position.

20. The alleged shooting of Anisa Pita is one of two scheduled sniping incidents in which the Prosecution claims that the source of fire lies in Baba Stijena, an area which lies on the northern flank of Mount Trebević and overlooks Širokača. In this general region, the ABiH held the northern

⁷² See for example *Tadić* Extension of Time-Limit Appeal Decision at para. 73; *Čelebići* Trial Judgment at para. 601, *Jelisić* Trial Judgment at para. 108. See also *Akayesu* Trial Judgment at para. 319.

⁷³ These incidents are scheduled sniping incidents 2, 3, 8, 16, 17, 20, 22 and 23 as well as scheduled shelling incidents 1, 2 and 5.

⁷⁴ Para. 537 of Judgment.

⁷⁵ Para. 533 of Judgment.

base of Mount Trebević and, to the east, the elevated position of Colina Kapa,⁷⁷ while the SRK controlled the upper parts of Mount Trebević itself.⁷⁸ As the Majority acknowledges, the evidence in the Trial Record concerning the party in control of the zone of Baba Stijena itself is not conclusive.⁷⁹ However, the Majority concludes that the SRK controlled “*much* of Mount Trebević, including upper regions in the general area of Baba Stijena affording a view of Sarajevo”.⁸⁰ When reviewing a map tendered by the Prosecution regarding this incident, ABiH general Vahid Karavelić stated that the confrontation lines appearing thereon were correct.⁸¹ According to that map, the Prosecution’s alleged source of fire lies in a no man’s land or a neutral area which is close to the ABiH front line.⁸² The evidence therefore does not establish that the SRK had access to the location where, according to the Prosecution, the source of fire in this incident lay. I also note that the maps tendered into evidence do not clearly disclose the exact position of Baba Stijena. This lack of precision is reflected in the testimonies of husband and wife Ekrem and Fatima Pita, the two witnesses who testified specifically about this incident. Fatima Pita, who pointed out Baba Stijena on a photograph,⁸³ did so in an unclear manner⁸⁴ and provided an estimate for the distance from the site of incident to Baba Stijena which differed significantly from that given by her husband.⁸⁵

21. There are other significant discrepancies between the testimonies of Ekrem and Fatima Pita. For example, while Fatima Pita believed that there were heavy combats in the area the night before the incident,⁸⁶ her husband remembered that night as having been quiet.⁸⁷ Husband and wife also

⁷⁶ As indicated by the Majority, no medical certificate was tendered regarding this incident. Footnote 1894 of Judgment.

⁷⁷ Ex. D1778 (Map marked by Witness DP11); Ex. P3704 (Map of Sarajevo); Ex. P3644.CH (Map of Sarajevo); Ex. D1809 (Map marked by Witness DP16); Ex. P3728 (Map related to scheduled sniping incident number 11 marked by Vahid Karavelić); Harding, T. 4460; Witness DP11, T. 15004; Golić, T. 14868; Witness DP20, T. 15657.

⁷⁸ Van Lynden, T. 2103; Ex. D1925 (Report by military Defence expert Radovan Radinović); Ex. P3704 (Map of Sarajevo).

⁷⁹ Para. 530 of Judgment.

⁸⁰ Para. 529 of Judgment (emphasis added). The Majority does not explain what is meant by “*much*.”

⁸¹ Karavelić, T. 11813. When considering a map related to scheduled sniping incident 11 in which the alleged source of fire was also Baba Stijena, Karavelić moved the position of the SRK front line north, so that the source of fire lay very close to SRK-controlled territory. See map entitled “sniping incident 11” of Ex. P3728 (Maps marked by Vahid Karavelić). Karavelić did not explain though why he had moved up north the position of the SRK front line with respect to scheduled sniping incident 11 but not scheduled sniping incident 2. Karavelić, T. 11832. The Majority considers that Karavelić “*may* not have taken sufficient time to examine carefully the map in relation to scheduled sniping incident 2 when being examined.” Footnote 1857 of Judgment (emphasis added).

⁸² Map entitled “sniping incident 2” of Ex. P3728 (Maps marked by Vahid Karavelić). Witness DP11 confirmed that area of Baba Stijena lay in “a neutral area” in between the confrontation lines. Witness DP11, T. 14984 – 14985 and 15006.

⁸³ Fatima Pita, T. 5923.

⁸⁴ The area which she indicated as Baba Stijena appears to be white sky in the background of the picture. See Fatima Pita, T. 5923 and Ex. P3266 (Photograph marked by Fatima Pita).

⁸⁵ Fatima Pita estimated that distance to be between 200 and 300 metres. Fatima Pita, T. 5879. Ekrem Pita though thought that this distance was somewhere between 350 and 1,200 metres as the crow flies, though he cautioned that he was unsure about his estimate. Ekrem Pita, T. 3991 and 4003. The Prosecution’s sniping expert Hinchliffe measured that distance to be 900 metres. Hinchliffe, T. 12946.

⁸⁶ Fatima Pita, T. 5876 and 5889. Fatima Pita added that the fighting stopped “at around perhaps 5.00 in the morning.” Fatima Pita, T. 5889.

⁸⁷ Ekrem Pita, T. 4009 - 4010.

provided differing evidence concerning the time of the incident. Both remembered that their daughter Anisa had been shot when she had returned home, at around 10:00 am;⁸⁸ Fatima Pita also thought, though she was not sure about the time, that her daughter Anisa Pita had left the house the morning of the incident somewhere between 8 and 9:00 am⁸⁹ before returning home ten minutes thereafter.⁹⁰ If Anisa Pita indeed only left her home for ten minutes, Fatima Pita's testimony raises doubts concerning the exact time of occurrence of the incident. Since the evidence establishes that the morning of incident was initially foggy⁹¹ but that the weather subsequently cleared up,⁹² determining reliably the time of occurrence of the incident would be important in determining the visibility at the time when the shooting took place.

22. Furthermore, both Ekrem and Fatima Pita explained that the line of sight was very narrow from the alleged source of fire, so that only five or six metres of the front entrance of their house was visible from Baba Stijena.⁹³ Two photographs taken from the front door of the Pitas' house show it to be completely walled in by neighbouring houses and structures such as fences, offering only a narrow line of sight in the supposed direction in of Baba Stijena.⁹⁴

23. There is also some uncertainty in the evidence concerning the number of shots fired during the incident. Fatima Pita testified at first that she had heard several "shots"⁹⁵ at the time. Later, she explained that she had "heard that [single] shot"⁹⁶ which injured her daughter, without clarifying whether she meant that only one bullet was fired at the time of the incident.⁹⁷ I also note that the bullet believed to have injured Anisa Pita was found in a slipper or shoe⁹⁸ and that Ekrem Pita explained that this bullet was kept and later misplaced by his elder brother after the incident.⁹⁹ Fatima Pita again remembered differently, testifying that she herself had retained the bullet, but had subsequently lost it.¹⁰⁰

⁸⁸ Ekrem Pita, T. 3974, 3977 and 3981; Fatima Pita, T. 5876.

⁸⁹ Fatima Pita, T. 5881.

⁹⁰ Fatima Pita, T. 5881.

⁹¹ Fatima Pita, T. 5889 and Ekrem Pita, T. 3974.

⁹² Fatima Pita, T. 5892.

⁹³ Fatima Pita, T. 5899. Ekrem Pita explained that "[t]he only place where [the incident] could have happened, it could have been that terrace that had, plus, minus, five or six metres." Ekrem Pita, T. 3987.

⁹⁴ Ex. P3266 (Photograph); Ex. P3279P (360 degree picture); Ex. P3280P (Video).

⁹⁵ Fatima Pita, T. 5882.

⁹⁶ Fatima Pita, T. 5893.

⁹⁷ Ekrem Pita, who did not witness the shooting incident itself, remembered hearing several shots when his daughter was halfway between the source of water and their home. Ekrem Pita, T. 3976.

⁹⁸ Ekrem Pita, T. 3977.

⁹⁹ Ekrem Pita, T. 3980.

¹⁰⁰ Fatima Pita, T. 5916.

24. Besides the uncertainty and discrepancy in the evidence, I find that the circumstances of the incident practically rule out that Anisa Pita was hit deliberately. In my view, hitting deliberately a small, kneeling child from a distance of 900 metres with only a narrow line of sight is almost impossibly difficult and I find it more likely that Anisa Pita would have been hit by a stray bullet.

25. For the reasons stated above, I am not satisfied that the evidence adduced by the Prosecution concerning the circumstances of the incident establishes beyond a reasonable doubt that the SRK deliberately targeted Anisa Pita on 13 December 1992.

3. Scheduled sniping incident 3

26. The Majority “finds that Witness E, a civilian, was deliberately targeted from SRK-controlled territory.”¹⁰¹ Although I share in the conclusion that Witness E, a small girl, was injured by a bullet while playing in the front yard of her house in Sedrenik, I respectfully dissent from the Majority’s finding because I do not believe that the Prosecution has established beyond a reasonable doubt that this projectile was fired deliberately from an SRK position at the victim.

27. The Majority concludes that there was an “unobstructed line of sight [from the location of the incident] to Špicasta Stijena” based on two photographs tendered into evidence showing that the alleged source of fire was visible from the yard where Witness E was injured.¹⁰² These photographs were presumably taken at the shoulder-height level of an adult person from the yard, which was surrounded by houses. It is unclear though whether these photographs would have indicated the existence of a line of sight had they been taken at the level of a small child who was kneeling in the garden. The photographs also show that the garden is almost completely surrounded by nearby houses, leaving only a narrow line of sight towards Špicasta Stijena.¹⁰³ I also note that the Majority states that Witness E testified that the bullet “entered the upper part of her back before exiting through a lower region of her body,”¹⁰⁴ which leaves the size and position of her wound open for speculation and does not reflect completely the evidence, according to which “[t]he witness indicate[d] the back of the right shoulder”¹⁰⁵ as the entry point and the “[w]itness pointed to the same area but further down”¹⁰⁶ as the exit point.

¹⁰¹ Para. 518 of Judgment.

¹⁰² Para. 516 of Judgment.

¹⁰³ Ex. P3273 (Photographs marked by Witness E). See also para. 516 of Judgment.

¹⁰⁴ Para. 516 of Judgment.

¹⁰⁵ Witness E, T. 4039.

¹⁰⁶ Witness E, T. 4039.

28. Moreover, in describing the incident, the Majority fails to give proper weight to evidence indicating there was ongoing military combat in the area.¹⁰⁷ It ignores for example the evidence provided by Witness E regarding the proximity of trenches to her house.¹⁰⁸ It also fails to pay sufficient attention to Witness E's statement that "[t]he army defenders used to pass close by [her] house on their way to the front lines on the ridge above us",¹⁰⁹ and to her evidence that "right from the beginning of 1992"¹¹⁰ many people, including soldiers, used to go through the yard. In fact, the morning of the incident, Witness E had seen "a couple of soldiers"¹¹¹ passing through, although not at the time of the incident.¹¹² The Majority also omits to mention that Witness E testified that, on the ground of the yard, there was "[s]hrapnel from the shells that had landed from around the house before, and casings that were falling on the roof. They were shells. These are leftovers from bullets. You could see all over during the war, everywhere."¹¹³

29. Given the evidence of ongoing fighting and military presence nearby, the possible absence of a line of sight from the location of the incident to Špicasta Stijena, and the significant distance of 1,111 metres separating those last two points,¹¹⁴ I am not satisfied that the Prosecution has established beyond a reasonable doubt that Witness E was targeted deliberately.

4. Scheduled sniping incident 5

30. The Majority finds that "Almasa Konjhodžić, a civilian, was deliberately targeted and killed by a shot fired from SRK-controlled territory in Grbavića [on 27 June 1993]."¹¹⁵ Although I share in the conclusion that the victim, a civilian, died as a result of being shot, I respectfully dissent from the Majority's finding because I am not satisfied that the Prosecution has shown beyond a reasonable doubt that she was targeted deliberately.

¹⁰⁷ The Majority does note that "[t]here was ongoing fighting between the ABiH and the SRK in this area [Sedrenik]." Para. 511 of Judgment.

¹⁰⁸ Witness E, T. 4100. Speaking of the trenches, Witness E explained that "as [one] came out of the house, one could see them. And those other, no, who can see trenches? They wouldn't be called trenches if one could see them." Witness E, T. 4102.

¹⁰⁹ Witness E, T. 4097.

¹¹⁰ Witness E, T. 4052.

¹¹¹ Witness E, T. 4052.

¹¹² Witness E, T. 4052.

¹¹³ Witness E, T. 4079.

¹¹⁴ Hinchliffe, T. 12595. Witness E said in her statement that the distance was "700 metres air distance" and in her testimony that "we were all not that far from the front lines. We were not right next to them either." Witness E, T. 4100.

¹¹⁵ Para. 253 of Judgment.

31. The location where Konjhodžić was shot lies directly across from the Marshal Tito barracks,¹¹⁶ which had been occupied for a time by the ABiH¹¹⁷ and was in an area where fighting took place.¹¹⁸ UN representatives reported that on 27 June 1993 “the situation was relatively tense due to [small-arms] fire and [artillery] shelling in the vicinity of [the Marshal] Tito barracks.”¹¹⁹ Therefore, fighting was taking place in the area where Konjhodžić was shot on the day of the incident.¹²⁰

32. The evidence also establishes that two shots were fired during the incident.¹²¹ Sabri Halili, who was helping Konjhodžić during the shooting, believed that the first bullet had not been aimed at the victim because it “was flying much too high.”¹²² He also believed that the second shot had hit the victim only after having “ricocheted from the asphalt.”¹²³ On the other hand his wife, who was present at the site of the incident and heard this second shot, thought that this second bullet had hit the victim directly.¹²⁴ Thus, the first shot fired during the incident was not aimed at the victim and the second bullet, which hit Konjhodžić, may have ricocheted first.¹²⁵ In my view, this evidence does not conclusively exclude the possibility that the victim was hit by a stray bullet, perhaps originating from the fighting taking place in the area during the day of the incident.

33. I therefore conclude that the Prosecution has failed to show beyond a reasonable doubt that the SRK deliberately shot Almasa Konjhodžić on 27 June 1993.

5. Scheduled sniping incident 8

34. The Majority “finds that Mejra Jusović was fired upon from SRK-controlled territory in reckless disregard of the possibility that she was a civilian”.¹²⁶ Although I share in the conclusion that Mejra Jusović, a civilian, was injured by a bullet on 24 July 1993, I respectfully dissent from

¹¹⁶ Sabri Halili, T. 2666. See also Para. 247 of Judgment.

¹¹⁷ The Muslim forces were concentrated and trained at the Tito Barracks. Van Baal, T. 11337.

¹¹⁸ Witness DP11, T. 14993.

¹¹⁹ Ex. D32 (UN situation report dated 28 June 1993) at p. 2. The Majority considers that this document “does not provide sufficient information on the situation at the Kranjčevića Street intersection at the time of the incident” and concludes that “the evidence shows beyond reasonable doubt that no military activity was underway at the time of the incident in the vicinity of Marshal Tito Barracks and that the victim and her family were being targeted deliberately.” Para. 251 of Judgment. I respectfully submit that by so concluding, the Majority lightly dismisses evidence from a credible source of significant relevance.

¹²⁰ The Majority indicates that the UN representatives also “confirmed that a cease-fire was in place” but omits to add that these international observers also stated that this “cease-fire [was] not respected because of 69 impacts have been reported [on 27 June 1993.]” Compare para. 251 of Judgment with Ex. D32 (UN situation report dated 28 June 1993) at p. 1.

¹²¹ Para. 247 of Judgment.

¹²² Sabri Halili, T. 2664.

¹²³ Sabri Halili, T. 2716.

¹²⁴ Milada Halili, T. 2757.

¹²⁵ Although the Majority “cannot exclude” this possibility of a ricochet, it nonetheless concludes beyond a reasonable doubt that the victim was targeted deliberately. Para. 251 of Judgment.

¹²⁶ Para. 523 of Judgment.

the Majority's finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that the projectile which struck the victim was fired from an SRK position, in reckless disregard of the possibility of that she was a civilian.

35. I begin by reviewing the circumstances of the incident as they appear in the Judgment. Mejra Jusović was returning home at about 6:00 am after collecting wood in an area in the vicinity of her house.¹²⁷ She testified that as she proceeded home, the sun had not come up yet and the weather was cloudy and overcast.¹²⁸ She heard two shots and immediately lay on the ground for cover.¹²⁹ A third shot injured her in her left buttock.¹³⁰ Špicasta Stijena, the ridge that the Prosecution and the victim¹³¹ believed to be the source of fire, was 901 metres away¹³² and was controlled by the SRK, while the ABiH was positioned approximately 50 metres below.¹³³ Furthermore, as noted in the Judgment, “[t]here was ongoing fighting between the ABiH and the SRK in this area.”¹³⁴

36. A footnote in the Judgment mentions Jusović's evidence that, on the day of the incident, the ABiH and the SRK had fought and that “[s]hells fell that day, and there was a lot of fire, gunfire.”¹³⁵ The Majority concludes that “Mejra Jusović did not report that there was any ongoing fighting at the time of the incident,”¹³⁶ presumably because she did not specify when this military activity had begun or ended. That more than one bullet was fired at the time of the incident might suggest that these shots could have resulted from ongoing combats. Nonetheless, the Majority concludes, based on the above evidence and the fact that the victim was lying on the ground when she was injured, that Jusović was “targeted by several bullets and in such a position, was made the object of the attacks.”¹³⁷

37. The possibility that Jusović was struck by a bullet during ongoing military combat finds support in the evidence indicating that there were military facilities near the place where the victim was injured. A resident of Sedrenik, Witness E, testified that there were ABiH trenches in the area of the incident. The Majority dismisses her evidence because she “warned during her testimony

¹²⁷ Para. 519 of Judgment.

¹²⁸ Jusović, T. 4140.

¹²⁹ Para. 519 of Judgment.

¹³⁰ Para. 519 of Judgment.

¹³¹ Jusović, T. 4138 and 4206.

¹³² Hinchliffe, T. 12978. The distances measured by Prosecution sniping expert Hinchliffe were accepted by the Majority in most of the other scheduled sniping incidents but in this instance, the Majority concludes that the distance separating the site of the incident from the source of fire was “*between*” 600 and 900 metres - and not 901 metres as measured by Hinchliffe. Para. 520 of Judgment (emphasis added).

¹³³ Para. 511 of Judgment.

¹³⁴ Para. 511 of Judgment.

¹³⁵ See Jusović, T. 4206 – 4207 and footnote 1805 of Judgment.

¹³⁶ Para. 521 of Judgment.

¹³⁷ Para. 521 of Judgment.

about her placement of the trenches as she 'can't read maps very well'¹³⁸ and she 'never went to [these] trenches.'"¹³⁹ However, when Witness E stated she was not able to read maps very well, she was referring to the front line separating the two armies and not to the trenches, which were much closer to her home.¹⁴⁰ Furthermore an SRK soldier stationed in the area of Sedrenik identified two more ABiH lines, which were protected by trenches and houses and lay apparently much closer to the site of the incident.¹⁴¹

38. Since the sun had not yet come up at the time of the incident, I am not satisfied that the luminosity would have enabled someone positioned at Špicasta Stijena, some 900 metres away, to target Jusović as she was lying down. The Majority attempts to strengthen its conclusion by arguing that the victim could have been more easily hit from an elevated position such as Špicasta Stijena.¹⁴² I do not find this argument persuasive since the Majority cites no evidence indicating the elevation differential between the site of the incident and Špicasta Stijena. Furthermore, I note that the evidence indicates that there were trenches and frequent combat near the site of the incident. For all these reasons, I am not satisfied that the evidence regarding this incident establishes beyond a reasonable doubt that Mejra Jusović was deliberately fired upon from an SRK-position on 24 July 1993.

6. Scheduled sniping incident 16

39. The Majority finds that Ramiza Kundo, the victim in this incident, was fired upon from SRK-controlled territory, if not with the intention to attack her as a civilian, then at least in full awareness of the high risk that the target was a civilian.¹⁴³ Although I share in the conclusion that Ramiza Kundo, a civilian, was injured by a bullet on 2 November 1993, I respectfully dissent from the Majority's finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that this bullet was deliberately fired from an SRK position.

40. I first consider the circumstances of the incident. As described in the Majority's opinion, Ramiza Kundo indicated in her video-taped interview that she was heading towards a well to fetch water when she was injured in the calf by a bullet, while in her written statement and during her testimony at trial, she, along with an eye-witness of the incident, indicated that she had been injured

¹³⁸ Para. 521 of Judgment.

¹³⁹ Para. 521 of Judgment.

¹⁴⁰ Witness E, T. 4108. See also footnote 108 of this Opinion.

¹⁴¹ Witness DP53, T. 16126 - 16128.

¹⁴² Para. 521 of Judgment.

¹⁴³ Para. 429 of Judgment.

while returning from the same well.¹⁴⁴ I am troubled that the victim could mistakenly indicate this basic circumstance of her injury when re-enacting the incident on location.

41. My concerns are not lessened when the evidence about the possible sources of fire is considered. In her written statement, Kundo indicated that she “was wounded by a sniper shooting from the train depot”¹⁴⁵ located in “Sarajevsko Polje, [located] about 800 metres from [her] house [and from where many people in her neighbourhood] were hit by snipers.”¹⁴⁶ Her testimony was somewhat different and she explained that:

I think that [the shot came from my] right ... I don't know exactly. I know it was from below, where the Serbian lines were ... I don't know exactly what it was called. Bacici or something like that. Serbian field, Sprska pole [sic]. There was a railway station there.¹⁴⁷

Eye-witness Menzilović believed that the shot responsible for Kundo's injury had “come from the direction of Polje,”¹⁴⁸ while the victim's husband indicated in his written statement that the shot had originated “from the direction of the depot.”¹⁴⁹ The official report from Novi Grad Public Security Station concerning the incident stated that the round which had injured Kundo had been fired from “the Rajlovac depot.”¹⁵⁰ I deduce from this evidence three possible sources of fire: “polje” (or “field”), the Rajlovac depot and the area of Bačići. Siniša Krsman, an officer in the SRK's Rajlovac brigade,¹⁵¹ explained though that there was no line of sight from the Rajlovac depot to the site of the incident and that the “polje” had been abandoned by the SRK and lay in a no man's land during the conflict.¹⁵² As for the Bačići area, officers from both the SRK and the ABiH indicated that this area was controlled by the ABiH, not the SRK.¹⁵³ The evidence fails therefore to establish conclusively that the SRK fired the shot which injured Kundo and whether it came from the Rajlovac depot, “polje” or the area of Bačići.

42. The evidence is equally inconclusive with respect to the exact location of the Prosecution's alleged source of fire, namely the southern tip of the area of Briješće lying immediately north of Bačići.¹⁵⁴ For example, it is unclear which army controlled that southern tip. According to ABiH general Vahid Karavelić, that area lay in SRK-controlled territory while Siniša Krsman disagreed,

¹⁴⁴ Footnote 1480 of Judgment. The victim's husband indicated in his written statement that his wife was wounded as she “was standing on the doorway and looking in the direction of enemy positions.” Ex. D76 (Written statement by Hilmo Kundo dated 30 September 1994).

¹⁴⁵ Ex. P3673 (Written statement by Ramiza Kundo dated 4 May 2001).

¹⁴⁶ Ex. P3673 (Written statement by Ramiza Kundo dated 4 May 2001).

¹⁴⁷ Kundo, T. 5973 – 5974.

¹⁴⁸ Menzilović, T. 6989. She added that shooting often originated from this area. Menzilović, T. 7041.

¹⁴⁹ Ex. D76 (written statement of Hilmo Kundo dated 30 September 1994).

¹⁵⁰ Ex. D75 (Official report of Novi Grad Public Security Station dated 2 November 1993).

¹⁵¹ Krsman, T. 19031 – 19033.

¹⁵² Krsman, T. 19060 – 19062.

¹⁵³ See Ex. P3728 (Series of maps marked by Vahid Karavelić) and Ex. D1844 (Map marked by Siniša Krsman).

indicating that his army did not control this southern tip.¹⁵⁵ Even if this contradiction in the evidence is ignored and the area is assumed to be controlled by the SRK, the existence of a line of sight is not established because of the topography of the area. The evidence indicates that Kundo was injured on a hill called Briješko brdo,¹⁵⁶ that the distance from this hill to the southern tip of Briješće was in the order of 600 metres¹⁵⁷ and that this latter area lies 200 metres lower down than the site of the incident.¹⁵⁸ A panoramic photograph of the site of the incident confirms that, looking from the site of the incident in the direction of the Prosecution's alleged source of fire, Briješko brdo's slope is gentle over an initial distance, after which it becomes much steeper.¹⁵⁹ Given this layout, I am not satisfied that a shooter positioned about 600 metres away in the southern tip of Briješće would have been able to look up on Briješko brdo and see or deliberately shoot Kundo in the calf.

43. In reaching this conclusion, I am aware that a photograph tendered shows that the Prosecution's alleged source of fire is visible from the site of the incident.¹⁶⁰ This evidence though does not establish that the victim's calf was visible from the southern tip of Briješće since the Trial Record does not disclose whether this photograph was taken at shoulder-height level while standing on the hill or at the height of a person's calf. I also take note that the Majority "estimates the difference in altitude [between the site of the incident and southern tip of Briješće] to be between 40 and 80 metres, most probably around 60 metres"¹⁶¹ or significantly less than 200 metres. To arrive at this conclusion, the Majority consulted the elevation lines indicated on maps in evidence which did not relate specifically to scheduled sniping incident 16 and which did not indicate when tendered the locations of the site of this incident and of the Prosecution's alleged source of fire.¹⁶² The Majority's consultation of these maps therefore includes an element of imprecision, reflected in the tentative language of its conclusion, since it had to determine approximately these locations on the maps. Furthermore, even if I were to assume that the Majority's figure of 60 metres satisfies the

¹⁵⁴ See Ex. P3728 (Series of maps marked by Vahid Karavelić).

¹⁵⁵ Compare See Ex. P3728 (Series of maps marked by Vahid Karavelić) and Ex. D1844 (Map marked by Siniša Krsman).

¹⁵⁶ Ex. D75 (Official report of Novi Grad Public Security Station dated 2 November 1993) and Ex. P3729V (360 degree photograph of site of scheduled sniping incident 16).

¹⁵⁷ Krsman, T. 19064. The Majority refers to that distance as being "at least a couple of hundred metres" but does not explain how it has arrived at this figure. Para. 426 of Judgment.

¹⁵⁸ Krsman, T. 19064.

¹⁵⁹ Ex. P3729V (360 degree photograph of site of scheduled sniping incident 16). See also para. 421 of Judgment.

¹⁶⁰ See Ex. P1812A (Photograph).

¹⁶¹ Para. 426 of Judgment.

¹⁶² The maps which the Majority consulted but which did not relate specifically to the incident are Ex. D1916 (Map of Sarajevo) and Ex. P3724 (Map of Sarajevo).

evidentiary burdens of a criminal trial, the existence of a line of sight between the victim's calf and a shooter positioned 600 metres away would still not be established.¹⁶³

44. In sum, significant discrepancies in the evidence as well as issues concerning the source of fire and line of sight lead me to conclude that the Prosecution has failed to establish beyond a reasonable doubt that the SRK deliberately, or recklessly, shot Ramiza Kundo on 2 November 1993.

7. Scheduled sniping incident 17

45. The Majority finds that the victim in this incident, Fatima Osmanović, was shot from SRK-controlled territory, if not with the intention to attack her as a civilian, then at least in full awareness of the high risk that the target was a civilian.¹⁶⁴ I respectfully dissent from this conclusion because I am not satisfied that the Prosecution has established beyond a reasonable doubt that Fatima Osmanović was shot deliberately in November 1993 from an SRK position.

46. The Trial Chamber heard limited evidence from two witnesses concerning the circumstances of the incident. The first such individual, Rasema Menzilović, witnessed the shooting of Osmanović but her account of the incident spanned only three or four transcript pages in which she essentially indicated that Osmanović was shot in the face near the site of scheduled sniping incident 16 and that the alleged victim was subsequently taken to hospital for treatment.¹⁶⁵ The second individual, Ramiza Kundo, did not witness the incident¹⁶⁶ but indicated that she knew that Osmanović had been injured by shooting.¹⁶⁷ No medical certificate was tendered into evidence to confirm Osmanović's injury and the Trial Record does not disclose either the incident's exact date or the precise location of its occurrence.¹⁶⁸

47. The Prosecution claims that Osmanović's shooting took place near the site of scheduled sniping 16 and that the source of fire was identical to that of the other incident.¹⁶⁹ Consequently, my comments concerning the source of fire in scheduled sniping incident 16 apply here and are not repeated.¹⁷⁰

¹⁶³ The existence of such a line of sight would depend, among other things, on the manner in which Brijesće brdo slopes.

¹⁶⁴ Para. 433 of Judgment.

¹⁶⁵ Those pages include Menzilović, T. 6991 – 6995, 7045 and 7059 – 7060.

¹⁶⁶ Only two persons witnessed the incident, Rasema Menzilović and Hata Pedisa. Menzilović, T. 7015 and 7045. Only Menzilović testified at trial.

¹⁶⁷ Ex. P3673 (Written statement of Ramiza Kundo dated 4 May 2001).

¹⁶⁸ The Majority relies exclusively on the information furnished by the Prosecution to determine the date of the incident. Footnote 1512 of Judgment.

¹⁶⁹ See for example Ex. P3728 (Series of maps marked by Vahid Karavelić).

¹⁷⁰ See para. 42 of this Opinion.

48. In light of the absence of evidence about basic circumstances of the shooting and the issues related to the source fire, I conclude that the Prosecution failed to show beyond a reasonable doubt that the SRK deliberately, or recklessly, shot Fatima Osmanović in November 1993.

8. Scheduled sniping incident 20

49. The Majority concludes that Hatema Mukanović was killed as a result of a deliberate attack launched from SRK-controlled territory on Hrasno Brdo on 11 January 1994.¹⁷¹ Although I share in the conclusion that the victim, a civilian, was hit by a bullet fired from an SRK position on Hrasno Brdo, I respectfully dissent from the Majority's finding because I cannot rule out the possibility that the victim was hit unintentionally.

50. The Trial Record establishes that the victim was shot after dark from a distance of about 760 metres in her apartment's dining room, which was illuminated by a single candle and in which the blinds were closed.¹⁷² The Majority observes that SRK soldiers in Hrasno Brdo used infrared sights at night,¹⁷³ but I am not convinced that a shooter, even if aided with such equipment, could have discerned enough from the attenuated glow of the candlelight to target the victim at such a distance. The Majority also dismisses the possibility that the victim might have been hit by a stray bullet because, among other things, the evidence "establishes that two bullets were fired deliberately at a candle-lit window of a civilian apartment block."¹⁷⁴ The evidence does not so clearly indicate that more than one bullet was fired. Of the two persons who testified specifically about this incident, the first, the victim's husband, who witnessed the shooting, explained that he believed that two bullets had been fired after examining damage done to a window in his dining room.¹⁷⁵ He also explained though that he had only heard a single "bang"¹⁷⁶ at the time of the incident. Furthermore, the second person who testified specifically about this event, a police officer who investigated Mukanović's shooting, referred only to a single bullet when describing his inquiry into the incident.¹⁷⁷

¹⁷¹ Para. 284 of Judgment.

¹⁷² Para. 278 and 280 of Judgment. The incident took place during winter time and it was already dark outside; there was no electricity available inside the apartment. Para. 278 of Judgment.

¹⁷³ Para. 283 of Judgment. The Majority apparently concedes that even with the assistance of night-sights, it would have been difficult to target someone behind blinds at night from a distance of almost 800 metres. It nonetheless concludes that "the attacker should have known that, by deliberately targeting a window (with a light) of an apartment in a residential block of flats, civilian casualties would result." Para. 283 of Judgment.

¹⁷⁴ Para. 284 of Judgment.

¹⁷⁵ Mukanović, T. 3065. Mukanović also explained that bullets had entered his apartment on previous occasions. Mukanović, T. 3057 – 3058.

¹⁷⁶ Mukanović, T. 3063.

¹⁷⁷ Witness J, T. 8061.

51. The possibility that Mukanović was hit by a single bullet fired unintentionally into her apartment during an exchange between the SRK and the ABiH finds support when the location of ABiH facilities is considered. The victim's apartment faced the confrontation lines located on a hill, with the SRK controlling the upper part while the ABiH controlled the lower part.¹⁷⁸ A company command and part of a battalion of the ABiH occupied the ground floor of a building in Trg Heroja or Hero Square, which lies approximately halfway along the general path between the victim's apartment and positions on Hrasno Brdo identified by the Prosecution as possible sources of fire.¹⁷⁹ In addition, the ABiH operated out of the first two floors of a structure known as the "Loris building," which abutted confrontation lines and also lay along the general path between the site of the incident and potential SRK sources of fire.¹⁸⁰

52. Because of the above evidence concerning visibility, the numbers of bullets fired and the location of ABiH installations, I conclude that the Prosecution has failed to show beyond a reasonable doubt that the SRK deliberately shot Hatema Mukanović on 11 January 1994.

9. Scheduled sniping incident 22

53. The Majority finds that "civilian passengers of a civilian vehicle were deliberately targeted from SRK-controlled territory [on 25 May 1994] and that such targeting resulted in the wounding of Sehadeta Plivac and Hajra Hafizović."¹⁸¹ Although I share in the conclusion that this civilian bus was hit by a bullet, I respectfully dissent from the Majority's finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that this bullet was fired from an SRK position with the deliberate intention of harming civilians.

54. The Prosecution alleged two possible sources of fire, both located in Nedarići, which it indicated in a map tendered into evidence.¹⁸² The first such location lies in the middle of this map¹⁸³ while the second is in the Faculty of Theology. Ramiz Grabovica, the conductor of the bus who witnessed the shooting, and Refik Sokolar, a police investigator who subsequently investigated the incident, both testified that they had concluded that the source of fire originated from the Faculty of

¹⁷⁸ Mukanović, T. 3073.

¹⁷⁹ Karavelić, T. 11857. Maps entitled "sniping incident 20" and "sniping incident 27" in Ex. P3728 (Maps marked by Vahid Karavelić).

¹⁸⁰ Mukanović, T. 3103; Karavelić, T. 11808 – 11809. Map entitled "sniping incident 7" in Ex. P3728 (Maps marked by Vahid Karavelić). The presence of this building may explain why bullets had entered the victim's apartment on a number of occasions. See Mukanović, T. 3057 – 3058.

¹⁸¹ Para. 367 of Judgment.

¹⁸² Map entitled "sniping incident 22" in Ex. P3728 (Maps marked by Vahid Karavelić).

¹⁸³ According to one witness, "there were Muslim houses" which obstructed the view from this location to the site of the incident. Witness DP8, T. 14783. As the Majority acknowledges, "indeed there [was no line of sight to the spot of the incident] because high buildings [...] obstruct[ed] the view." Para. 363 of Judgment.

Theology in Nedarići.¹⁸⁴ As noted in the Judgment though, there is conflicting evidence on whether a line of sight existed from the Faculty of Theology to the site of the incident and these locations are 1,500 metres apart, a significant distance “for a small arm fire to aim at a target.”¹⁸⁵ There is therefore insufficient evidence to conclude beyond a reasonable doubt that the bullet responsible for the wounding of the two victims on the bus originated from the Faculty of Theology, which was identified as the source of fire by the two witnesses who testified specifically about this incident.

55. Despite this doubt concerning the location of the source of fire, the Majority concludes nonetheless that since “the evidence that the fire [in this incident] originated from the [general] direction of Nedarići [is] reliable, the only reasonable inference is that the bullet, which hit the victims, was fired from the area of Nedarići.”¹⁸⁶ There is confusion in the evidence though about the direction of fire. When presented with two photographs taken at the site of the incident and showing the direction of fire, Grabovica stated that both pictures presented a view towards Nedarići.¹⁸⁷ Another witness, who was born in Nedarići,¹⁸⁸ looked at one of these same photographs and concluded that it represented “a view towards the houses at the airport settlement. They were part of the Nedarići district, but they were separated by water. [The view] is more towards the airport settlement across the water [than to Nedarići].”¹⁸⁹ This evidence was corroborated by a soldier posted in Nedarići during the conflict,¹⁹⁰ who also believed that one of these two photographs did not offer a view in the direction of Nedarići but towards the airport settlement.¹⁹¹ I conclude therefore that the evidence does not establish conclusively that the bullet responsible for this incident originated from Nedarići.

56. In light of the foregoing concerns related to the locations and distances of the possible sources of fire, I am not satisfied that the Prosecution has established beyond a reasonable doubt that the civilian passengers inside the bus were targeted from SRK-controlled territory on 25 May 1994 with the deliberate intention of harming civilians.

¹⁸⁴ Para. 363 of Judgment. Grabovica testified that the passengers on the bus “believed that a sniper was shooting at them from the Faculty of Theology in Nedarići.” Grabovica, T. 3668. Sokolar stated in a report that “it was confirmed that the bullet had come from the Faculty of Theology.” Ex. P2637.1 (English translation of report issued by Novi Grad Public Security Station) at p. 1.

¹⁸⁵ Para. 365 of Judgment.

¹⁸⁶ Para. 365 of Judgment. One witness testified that there was no line of sight between the Faculty of Theology and the site of the incident “because from [the Faculty of Theology] one could only see the tops of the first buildings in Dobrinja V.” Witness DP8, T. 14741.

¹⁸⁷ Grabovica, T. 3655 – 3656.

¹⁸⁸ Witness DP7, T. 15116.

¹⁸⁹ Witness DP7, T. 15183.

¹⁹⁰ Witness DP8, T. 14716 – 14717.

¹⁹¹ Witness DP8, T. 14823 – 14824.

10. Scheduled sniping incident 23

57. The Majority finds that Fatima Salčin and Đemal Maljanović were fired upon from SRK-controlled territory, if not with the intention to attack them as civilians, then in reckless disregard of their civilian status.¹⁹² Although I share in the conclusion that Salčin was injured by a bullet during this incident, I respectfully dissent from the Majority's finding because I am not satisfied that the Prosecution has shown beyond a reasonable doubt that Salčin and Maljanović were deliberately fired upon from an SRK position.

58. There is significant uncertainty concerning the source of fire in this incident. Unlike other scheduled sniping incidents where the Prosecution identified the location of alleged sources of fire,¹⁹³ the Prosecution explained in this case that it was not "able to say with any certainty beyond the front line where the shot [reponsible for Salčin's injury] came from"¹⁹⁴; instead, it spoke of a source of fire lying somewhere in "the vicinity of [a] cone"¹⁹⁵ drawn over SRK-controlled territory in Nedarići.¹⁹⁶ The evidence provided by Salčin and Maljanović, the only two witnesses to testify specifically about this incident, echoes the Prosecution's uncertainty about the location of the source of fire. Salčin, who believed that the weapon used in the shooting was a machine-gun,¹⁹⁷ indicated only that the source of fire lay in the general direction of Nedarići.¹⁹⁸ Maljanović, who was accompanying Salčin,¹⁹⁹ explained in hesitant terms that the shooting might have originated from a monastery²⁰⁰ or perhaps from the former JNA barracks in Nedarići,²⁰¹ because he thought that there were "machine-gun nests"²⁰² in both places. The monastery and barracks though lie in different directions from the site of the incident and are separated from one another by a distance of 1,000 metres,²⁰³ reflecting the uncertainty about the source of fire. In addition, a distance of well over 1,000 metres separates the site of the incident from either place, so that it is unclear whether

¹⁹² Para. 317 of Judgment.

¹⁹³ See maps entitled "sniping incident 2" and "sniping incident 6" of Ex. P3728 (Maps marked by Karavelić), for examples of incidents where the Prosecution clearly identified alleged sources of fire.

¹⁹⁴ T. 21708. The Prosecution attributed this inability to the construction of structures which took place after the war in the area. T. 21708.

¹⁹⁵ T. 21707.

¹⁹⁶ See map entitled "sniping incident 23" of Ex. P3728 (Maps marked by Vahid Karavelić). Prosecution sniping expert Hinchliffe identified another potential source of fire halfway between the Faculty of Theology and the site of the incident and located only 560 metres from that latter point. Hinchliffe, T. 12993. The evidence does not disclose why Hinchliffe searched for another source of fire not identified in the evidence and the Prosecution does not mention this additional source of fire in its final brief.

¹⁹⁷ Salčin, T. 2946.

¹⁹⁸ Salčin, T. 2934 – 2935; Ex. P3280F (Videotape). According to an ABiH general most, though not all, of Nedarići was controlled by the SRK. Map entitled "sniping incident 23" of Ex. P3728 (Maps marked by Vahid Karavelić).

¹⁹⁹ Para. 311 of Judgment.

²⁰⁰ Maljanović explained that "I *think* that – but it's *only my opinion* – that they came from that – that the shots *presumably* came from the monastery." Maljanović, T. 3008 (emphasis added).

²⁰¹ Maljanović, T. 2980.

²⁰² Maljanović, T. 2980.

²⁰³ Para. 312 of Judgment.

someone armed with a machine-gun could have targeted deliberately Salčin and Maljanović from so far away on a day when the weather was “overcast” and “drizzling.”²⁰⁴

59. Nonetheless, the Majority concludes that the shooting originated from SRK-controlled territory, adding that Salčin and Maljanović could only have been targeted deliberately because many people were killed or wounded in the area across the confrontation line²⁰⁵ and that protective screens had been erected in response to attacks.²⁰⁶ Indeed, Salčin remembered that a cease-fire had been in effect on 13 June 1994 and that civilians were out and about.²⁰⁷ Her recollection as a witness was weak though; for example, she could not correctly remember the year in which the incident took place, although it had resulted in her injury, or state where Maljanović lived, even though both witnesses are related, have known each other since childhood and lived near one another at the time of the shooting.²⁰⁸ Furthermore, Maljanović explained that he had heard at the hospital where he had taken Salčin for treatment after her injury that two other persons, including a young man on a bicycle, had been shot near the site of the incident on 13 June 1994.²⁰⁹ He did not provide further details about this other shooting, leaving open the possibility that this other incident might have occurred as a result of a military exchange underway in the area.

60. This possibility finds support in the evidence indicating that there was frequent fighting in the general area of Mojmiilo, where the incident took place.²¹⁰ According to ABiH general Vahid Karavelić, some of “[t]he most intense battles in Sarajevo”²¹¹ took place in the area of Mojmiilo.²¹² Witness DP5, an SRK officer located in Nedarići,²¹³ added that there were frequent military exchanges between the belligerents in the area of the site of the incident itself.²¹⁴ He also remembered seeing near this site, “200, 250 metres approximately”²¹⁵ higher up, an ABiH cannon

²⁰⁴ Para. 311 of Judgment. Witness DP5 estimated that the distance from the Faculty of Theology to the location of the incident to be between 1,300 and 1,400 metres. His estimate coincides with the Trial Chamber’s conclusion based on a review of map Ex. P3100 (Map marked by Đemal Maljanović).

²⁰⁵ No evidence was provided to support this assertion.

²⁰⁶ The evidence discloses that protective barriers had been erected along Lukavička street otherwise referred to as Ante Babića street, which ran along the confrontation lines. Para. 316 of Judgment.

²⁰⁷ Salčin, T. 2926.

²⁰⁸ Maljanović, T. 2926, 2971 and 2977 – 2979. Maljanović testified that Salčin had “said [to him on the day of the incident] that – there was a cease-fire, that we couldn’t hear one bullet.” Maljanović, T. 2986. He did not explain where and how Salčin had learned that a cease-fire was in effect.

²⁰⁹ Salčin, T. 2988.

²¹⁰ The site where the incident took place is in an elevated part of the city which culminates, approximately 1,000 metres further east, with the top of Mojmiilo hill which lies at an elevation of 680 metres. See Ex. D1785 (Map marked by Witness DP5) and Ex. P3100 (Map marked by Đemal Maljanović).

²¹¹ Karavelić, T. 11992.

²¹² Karavelić, T. 11992. An SRK soldier posted in the southern part of Sarajevo confirmed that the ABiH opened fire “on several occasions” from “Mojmiilo hill”. Vuković, T. 14631.

²¹³ Witness DP5, T. 15249 – 15250.

²¹⁴ Witness DP5, T. 15297.

²¹⁵ Witness DP5, T. 15432.

which would fire on Nedarići.²¹⁶ The victim indicated that after being shot she had “run into a trench,”²¹⁷ which might have been used by the military and which she later on evasively described as “a kind of a trench.”²¹⁸

61. The circumstances of the incident do not rule out that Salčin might have been hit by a single stray bullet fired in the course of one of these military exchanges. Maljanović explained that a first bullet had hit Salčin and added, confusingly, that a second shot followed which “couldn’t hit [Salčin or himself].”²¹⁹ The evidence does not reveal whether this second shot had been aimed at both witnesses or had been fired at some other target.

62. In sum, I am not satisfied that the location of the source of fire has been established with sufficient precision. Even if I were to assume that the bullet responsible for Salčin’s injury originated from SRK-controlled territory, the evidence does not rule out the possibility that Salčin might have been hit unintentionally during one of the frequent military exchanges in the area of Mojmiilo. I therefore conclude that the Prosecution failed to show beyond a reasonable doubt that the SRK deliberately fired upon Fatima Salčin and Đemal Maljanović on 13 June 1994.

11. Scheduled shelling incident 1

63. The Majority finds that “the first [scheduled] shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area.”²²⁰ Although I share in the conclusion that two shells exploded in Dobrinja on 1 June 1993 in a parking lot where a football match was taking place, I respectfully dissent from the Majority’s finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that these projectiles were deliberately or indiscriminately fired from SRK-controlled territory at civilians.

64. Even assuming that the evidence establishes beyond a reasonable doubt – *quod non* – that the two shells were fired from SRK-controlled territory,²²¹ there was a significant ABiH presence

²¹⁶ Witness DP5, T. 15297. Ex. D1785 (Map marked by Witness DP5).

²¹⁷ Salčin, T. 2946.

²¹⁸ Salčin, T. 2969.

²¹⁹ Maljanović, T. 2986 – 2987.

²²⁰ Para. 387 of Judgment.

²²¹ Captain Houdet, a UN representative had investigated the incident had observed that “due to the macadam, there is no fuse furrow, so that [the] angle of descent and range [could not] be determined.” Ex. P1367 (Report by Captain Houdet) at p. 1. Captain Houdet also went on to estimate the minimum angles of descent of the two shells to be 40.5 and 45.71 degrees based on the distances between the craters to the roof of nearby buildings along the direction of fire and concluded that the projectiles “can have been fired only from [the] Serbian side. At the minimum range, the mortars were 300 south of Lukavica barracks.” Ex. P1367 (Report by Captain Houdet) at p. 1. The Trial Chamber concludes that Houdet’s finding is questionable since “a steeper angle of descent of a mortar shell could indicate that these [shells] were fired from a closer range,” but such a conclusion involves a *petitio principii*. Para. 380 of Judgment.

both in and near the parking lot in Dobrinja on the day of the incident. As the Majority acknowledges, the evidence establishes “that there were soldiers present in the parking lot, who were off-duty”²²² and were wearing uniforms.²²³ In the crowd of 200 or so persons gathered to watch the football match,²²⁴ from one-third to one-half of those present may have been soldiers²²⁵ and most of those injured and killed by the explosion of the two shells belonged to the ABiH.²²⁶ The evidence also establishes that a nuclear shelter was located approximately 100 metres from the parking lot.²²⁷ According to two witnesses, the ABiH made use of this facility,²²⁸ perhaps because it lay very close to the confrontation lines.²²⁹ Furthermore, an ABiH brigade commander in Dobrinja indicated that the distance from the confrontation lines to the parking lot was in the order of only 120 metres.²³⁰ As the Majority also acknowledges, there was a series of connecting trenches in the vicinity of the parking lot which may have been “also used by ABiH soldiers.”²³¹ The significant ABiH presence in the vicinity of the parking lot might account for the evidence establishing that this area of Dobrinja was frequently shelled during the conflict.²³²

65. In light of the preceding evidence regarding the ABiH presence in and near the site of the incident, I conclude that the Prosecution has not established beyond a reasonable doubt that the two shells that exploded on 1 June 1993 in Dobrinja were fired deliberately or indiscriminately by the SRK at civilians.

12. Scheduled shelling incident 2

66. The Majority finds that “the water queue of civilians in Dobrinja ‘C5’ was deliberately targeted on 12 July 1993 by an 82 mm mortar shell fired from SRK-held territory.”²³³ Although I share in the conclusion that an 82 millimetre mortar shell exploded on 12 July 1993, injuring and killing civilians near a water pump in Dobrinja, I respectfully dissent from the Majority’s finding because I am not satisfied that the Prosecution has established beyond a reasonable doubt that this

²²² Para. 386 of Judgment.

²²³ Hadziabdić, T. 6793; Gavranović, T. 6716 and 6727.

²²⁴ Para. 387 of Judgment.

²²⁵ Hadziabdić, T. 6793.

²²⁶ A report of the ABiH 5th Motorised Dobrinja Brigade dated 1 June 1993 indicated that “[s]ix combatants [were] killed and 55 [were] wounded ... [and] 5 civilians [were] killed and 32 [civilian] persons [were] wounded [as a result of the incident.]” Ex. D25.1 (English translation of ABiH command report dated 1 June 1993).

²²⁷ Para. 382 of Judgment.

²²⁸ Footnote 1284 of Judgment.

²²⁹ Ex. P3732 (Map marked by Ismet Hadzić). Ex. P3732 indicates that the shelter lay almost on the confrontation line and it is not unreasonable to expect that the ABiH would have made use of such a facility. Although I agree with the Majority that shelling could not be expected to damage significantly a nuclear shelter, I would less readily exclude the possibility that mortar shells might be used to attack the entrance of the facility with the purpose of harassing ABiH soldiers.

²³⁰ Ex. P3732 (Map marked by Ismet Hadzić).

²³¹ Para. 383 of Judgment.

²³² Para. 387 of Judgment.

projectile was deliberately fired from SRK-controlled territory with the intention of harming civilians.

67. The 82 millimetre mortar shell responsible for this incident exploded in flight after colliding with a person and left no crater, only radial imprints on the pavement surface.²³⁴ From these imprints, a local police investigator and a UN representative both concluded that the direction of fire was “most probably” west-north-west.²³⁵ The absence of a crater though prevented the determination of the distance of fire of the shell,²³⁶ which would have established conclusively whether this projectile had been launched from beyond the confrontation line some 250 to 300 metres away, in SRK-controlled territory.

68. Even if the shell had been fired from SRK-controlled territory, the evidence would not establish that the projectile had been aimed deliberately at civilians given the significant ABiH presence in the vicinity of the water pump. Ismet Hadzić, a commander of the ABiH Dobrinja brigade, testified that when the shelling incident occurred, the ABiH was digging a tunnel from Dobrinja to Butmir which was inaugurated less than three weeks later.²³⁷ Different sources in evidence offered varying estimates of the distance from the entrance of this tunnel to the site of the incident, ranging from 30 to 200 metres.²³⁸ The Trial Record also establishes that the SRK knew about the Butmir end of the tunnel, which it shelled intensively,²³⁹ although it is unclear whether it was also aware of its Dobrinja entrance.²⁴⁰ Hadzić added that the ABiH had also installed a command post at about 100 meters from the water pump.²⁴¹

69. Another witness called by the Prosecution indicated the presence of other ABiH resources near this pump. Witness AE, who was wounded by the explosion of the shell,²⁴² thought that the closest front line was as close as 50 metres from the site of the incident.²⁴³ Witness AE also recalled that there were military trenches about 50 metres away from the site of the incident, although she did not remember if they had already been dug on 12 July 1993.²⁴⁴ She added in any event that she

²³³ Para. 397 of Judgment.

²³⁴ See footnote 1337 of Judgment.

²³⁵ Para. 393 of Judgment.

²³⁶ Ex. P1413 (UNPROFOR report dated 17 July 1993 regarding scheduled shelling incident 2) at p. 2.

²³⁷ Hadzić, T. 12259. Only ABiH military personnel participated in the construction of this tunnel. Hadzić, T. 12368 - 12369.

²³⁸ Hadzić testified that this distance was between 30 to 50 metres. Hadzić, T. 12259. A map marked by Hadzić indicated that distance to be somewhat less than 200 metres. Ex. P3732 (Map marked by Ismet Hadzić).

²³⁹ Hadzić, T. 12260.

²⁴⁰ Hadzić testified that no ABiH military units were stationed at the tunnel entrance the day of the incident and that he thought that the SRK did not know about the Dobrinja end of the tunnel. Hadzić, T. 12260.

²⁴¹ See Hadzić, T. 12215 and Ex. P3732 (Map marked by Ismet Hadzić).

²⁴² Para. 389 of Judgment.

²⁴³ Witness AE, T. 6028. Another person who was injured by the explosion believed that the confrontation line was further away, at “150 to 200 metres, more or less.” Taslaman, T. 7193.

²⁴⁴ Witness AE, T. 6033 – 6034.

had been warned by the police about the danger of going to the water pump,²⁴⁵ perhaps because the area had been shelled with some frequency.²⁴⁶ As a UN representative stationed at the nearby airport explained, SRK fire in the area was directed against ABiH positions in the vicinity of the airport.²⁴⁷

70. If it did indeed fire the mortar shell which exploded at the water pump, the SRK may have intended to target one of the nearby ABiH resources described above. Since I cannot exclude this possibility, I conclude that the Prosecution has not established beyond a reasonable doubt that the 82 millimetre mortar shell which exploded at the water pump in Dobrinja on 12 July 1993 was fired deliberately at civilians by the SRK.

13. Scheduled shelling incident 5

71. The Majority finds that the explosion in Markale market on 5 February 1994 was caused by a 120 millimetre mortar shell which was fired deliberately at civilians from SRK-controlled territory.²⁴⁸ Although I share in the conclusion that the Trial Record establishes that a 120 millimetre mortar shell caused the explosion in the market, I respectfully dissent from the Majority's finding because I am not satisfied that the evidence shows beyond a reasonable doubt that this projectile was fired from SRK-controlled territory.

(a) Determining the location of the source of fire

72. The claim advanced by the Prosecution that the SRK was responsible for this firing rests principally on the technical analysis of Dr. Berko Zečević, once an ABiH weapons researcher, who volunteered the day after the explosion to investigate the incident.²⁴⁹ On the basis of the characteristics of the crater left by the explosion of the shell in the market, Dr. Zečević deduced that the source of fire of this projectile lay deep within territory controlled by the SRK.²⁵⁰ I will therefore consider the two elements that this expert relied on in order to arrive at his conclusion about the location of the source of fire, namely (a) the direction of fire and (b) the distance of fire.²⁵¹

(i) Determining the direction of fire

²⁴⁵ Witness AE, T. 6029.

²⁴⁶ Another person injured by the explosion explained that his residential building, which was about 100 metres away from the water pump, had been shelled 7 times from 1993 to August 1994. Mehonić, T. 7335 and 7339.

²⁴⁷ Witness W, T. 9556.

²⁴⁸ Para. 493 of Judgment.

²⁴⁹ Zečević, T. 10312 and 10319 – 10321.

²⁵⁰ Para. 444 of Judgment.

²⁵¹ The shelling experts called by the Defence applied the same technical principles relied on by Dr. Zecević when considering this incident. Viličić, T. 20584 - 20585.

73. I agree with the conclusion found in the Judgment that the evidence establishes “beyond a reasonable doubt that the 120 mm mortar shell that exploded in Markale market on 5 February 1994 was fired from the direction north northeast of the market or at a bearing of approximately 18 degrees.”²⁵²

(ii) Determining the distance of fire

74. The evidence indicates that the distance at which a mortar shell has been fired can be deduced from the angle and speed at which the projectile impacts the ground.²⁵³ Increases in the angle of descent at the moment of impact particularly affect the determination of the distance of fire. For example, a 120 millimetre mortar shell which lands on its target at a speed of 235 metres per second and an angle of 55.6 degrees will have been fired from a distance of 6,464 metres;²⁵⁴ the same projectile landing on a target at approximately the same speed²⁵⁵ but at a steeper angle of 86.2 degrees will have been fired from a distance of only 1,168 metres.²⁵⁶ To a lesser extent, the deduced distance of fire will also decrease when the speed of the shell on impact decreases. The same example of the 120 millimetre mortar shell landing on a target at an angle of 55.6 degrees with a speed of 235 metres per second will illustrate this effect. When the angle of descent of the projectile remains approximately constant²⁵⁷ and the speed on impact decreases from 235 to 203 metres per second, the firing distance will decrease from 6,464 to 4,948 metres.²⁵⁸

75. The Trial Record indicates that the distance from the market to the SRK confrontation line along a north to northeastern direction was approximately 2,600 metres.²⁵⁹ I will therefore consider whether the evidence concerning the angle of descent and speed on impact²⁶⁰ of the 120 millimetre mortar shell that exploded in the market establishes that the distance of fire of the projectile was at least 2,600 metres, in SRK-controlled territory.

²⁵² Para. 465 of Judgment.

²⁵³ See for example Table 2 in Ex. D1917 (Defence Shelling Report) and table on p. 6 of Ex. P3276.1 (Zečević Ballistic Report).

²⁵⁴ Table 2 in Ex. D1917 (Defence Shelling Report).

²⁵⁵ To be precise, the speed on impact would be 248 metres per second - or slightly more than 235 metres per second. Table 2 in Ex. D1917 (Defence Shelling Report).

²⁵⁶ Table 2 in Ex. D1917 (Defence Shelling Report).

²⁵⁷ To be precise, the value of the angle would be 52.2 degrees - or slightly less than 55.6 degrees. See Table 2 in Ex. D1917 (Defence Shelling Report).

²⁵⁸ Table 2 in Ex. D1917 (Defence Shelling Report).

²⁵⁹ Para. 455 of Judgment.

²⁶⁰ The Majority refers in its discussion to the number of “charges” carried by a shell. See for example para. 443 of Judgment. Charges are increments of propellant that can be added to the base of a shell to give it a longer firing range. Hamill, T. 6074; Witness AD, T. 10590; Witness DP20, T. 15642; Knezević, T. 19025 – 19026; Gray, T. 19776. Ex. P3734 (Shelling report of Richard Higgs dated 12 February 2002). For purposes of this discussion, the number of charges may be considered equivalent to the speed of the shell; a high number of charges carried by a mortar shell will lead to a high speed of the shell. Table 2 in Ex. D1917 (Defence Shelling Report) and Ex. P3276.1 (Zečević Ballistic Report) at p. 6.

a. Evidence regarding the angle of descent

i. UN Report

76. Six days after the explosion in the market, seven military officers specially appointed by the UN due to their expertise in artillery investigated the incident, publishing their official conclusions in a report dated 15 February 1994 (the “UN Report”).²⁶¹ This special UN team of experts interviewed a member of the UN’s “Frebat 4 team,” which had arrived at the market approximately one hour after the explosion.²⁶² The Frebat 4 team had observed upon its arrival that there was a crater in the market which seemed intact and it had proceeded to extract the tail-fin of a mortar shell which was embedded inside by “chip[ping] away at the asphalt lip around the mouth of the crater, and enlarg[ing] the actual hole formed by the penetration of the [device.]”²⁶³ The Frebat 4 team though had not attempted to measure the angle of descent of the shell for reasons which are not reported.²⁶⁴ The special UN team then interviewed another UN representative, Captain Verdy, who had conducted an analysis of the crater in the market approximately one hour after Frebat 4 team’s own investigation.²⁶⁵ Captain Verdy also had not attempted to measure the angle of descent of the mortar shell “since the crater [in the market] had been disturbed by the previous [Frebat 4] team.”²⁶⁶ Instead, he had determined the direction of fire and had estimated the minimum angle of descent of the mortar shell from the angle formed between the crater in the market and the top of a nearby building along this direction of fire.²⁶⁷ The special UN team dismissed Captain Verdy’s estimated minimum angle of descent though due to a mathematical error in his determination of the direction of fire.²⁶⁸ Finally, the team interviewed another UN representative, Major Russell, who had conducted a third crater analysis on the day of the incident. Approximately one hour after Captain Verdy’s investigation, Major Russell arrived at the market and observed that “a chisel and a red pipe wrench [were] within one metre of the crater.”²⁶⁹ He had proceeded to the crater and had measured the angle of descent of the mortar shell to be between 67 to 73 degrees,²⁷⁰ using a method of measurement which was not disclosed to the special UN team.²⁷¹

²⁶¹ Hamill, T. 6077; Rose, T. 10196; Ex. P2261 (UN Report) at p. 2 and 6.

²⁶² Ex. P2261 (UN Report) at p. 9 and 30 – 31.

²⁶³ Ex. P2261 (UN Report) at p. 30 - 31. The tail-fin was then turned over to local authorities. Bešić, T. 4917 and Sabljica, T. 5338.

²⁶⁴ Ex. P2261 (UN Report) at p. 8 - 9.

²⁶⁵ Ex. P2261 (UN Report) at p. 8 and 10.

²⁶⁶ Ex. P2261 (UN Report) at p. 9.

²⁶⁷ Ex. P2261 (UN Report) at p. 9.

²⁶⁸ Ex. P2261 (UN Report) at p. 9.

²⁶⁹ Ex. P2261 (UN Report) at p. 31.

²⁷⁰ Ex. P2261 (UN Report) at p. 8 and 10.

²⁷¹ Hamill, T. 6096.

77. On 11 February 1994, or six days after the explosion, three experts of the special UN team, Captain José Grande, Commandant John Hamill and Major Sahaisar Khan, each conducted an analysis of the crater in the market.²⁷² Captain Grande did not attempt to measure the angle of descent because “[w]hen he arrived [at the market] (6 days after the incident) the crater had been excavated and slightly enlarged as [he and his colleagues] were informed by the previous analyst teams.”²⁷³ He concluded that “therefore [he] consider[ed] [him]self unable to give an estimation [sic] of the angle of descent [of the shell that exploded in the market.]”²⁷⁴ His colleagues Major Khan and Commandant Hamill attempted to measure this angle of descent.²⁷⁵ Commandant Hamill placed a stick inside the part of the crater where the tail-fin had been embedded and, using a protractor and a plumb line, measured the angle formed with respect to the ground to be between 53 and 62 degrees.²⁷⁶ Major Khan determined the angle to be approximately between 56 to 62 degrees, but, unlike Commandant Hamill, did not report the method he had used to arrive at this result.²⁷⁷ Major Khan also cautioned that “the angle of descent [which he had determined] should only be taken as a guide line [sic]”²⁷⁸ because the “crater formed by the bomb had been tempered [sic] time and again by various personnel.”²⁷⁹

78. On 12 February 1994, the same three UN experts each conducted one additional crater analysis at the market.²⁸⁰ This time, none of them attempted to measure the angle of descent of the projectile.²⁸¹ On 13 February 1994 another expert, Chief-Sergeant Dubant,²⁸² performed a last crater analysis; he did not measure the angle at which the projectile had landed on the market because “this action became impossible since the [crater] had been changed and, more particularly, redug [on the day of the incident] in order to extract the [tail-fin].”²⁸³

79. Based on the results of the ten crater analyses which they reviewed, the special UN team concluded in the UN Report that the angle of descent of the shell which exploded in Markale

²⁷² Ex. P2261 (UN Report) at p. 8.

²⁷³ Ex. P2261 (UN Report) at p. 20.

²⁷⁴ Ex. P2261 (UN Report) at p. 20.

²⁷⁵ Ex. P2261 (UN Report) at p. 10.

²⁷⁶ Hamill, T. 6087 – 6088; Ex. P2261 (UN Report) at p. 18.

²⁷⁷ Ex. P2261 (UN Report) at p. 16 – 17.

²⁷⁸ Ex. P2261 (UN Report) at p. 16.

²⁷⁹ Ex. P2261 (UN Report) at p. 16.

²⁸⁰ Ex. P2261 (UN Report) at p. 10.

²⁸¹ Ex. P2261 (UN Report) at p. 9. Commandant Hamill reported, without elaborating, that “the crater was disturbed between [his] first and second analyses, making the measurement [of the angle of descent] impossible on the second occasion.” Ex. P2261 (UN Report) at p. 18.

²⁸² Both Chief-Sergeant Dubant and Commandant Hamill are referred to in the UN Report as technical advisors to the special UN team. Ex. P2261 (UN Report) at p. 6.

²⁸³ Ex. P2261.2 (Translation of Sergeant Dubant’s analysis of the crater in Markale market).

market on 5 February 1994 could not be determined “with any acceptable degree of accuracy.”²⁸⁴

They explained that

[b]y the time [the special UN] team conducted its analyses, six days had elapsed since the explosion. It is [therefore] reasonable to suspect that the crater was thoroughly excavated by the local authorities during that period. Hence the angles measured on 11 Feb [1994 by Commandant Hamill and Major Khan] are not beyond suspicion. To assure accuracy, the angle must be measured when the tail fin and fuse [of a mortar shell] are in the ground, and this was not done on 5 Feb [1994]. Accordingly it is assessed that the results measured on 11 Feb [1994] are not sufficiently accurate to be used as a basis for a finding.²⁸⁵

ii. Zečević Ballistic Report

80. The day after the incident, a commission of three local explosive experts headed by Dr. Zečević (the “Zečević Ballistic Experts”) volunteered to investigate the explosion.²⁸⁶ Unlike the special UN team, the Zečević Ballistic Experts believed that the angle of descent of the shell which exploded in the market could be determined reliably, which they measured to be between 55 and 65 degrees.²⁸⁷ They explained in their report dated 7 February 1994 (the “Zečević Ballistic Report”) that they did so by using a method of measurement analogous to Commandant Hamill’s; they reinserted the recovered tail-fin in its original position in the crater in the market and measured the angle formed.²⁸⁸ They believed that this manual reinsertion of the tail-fin would not skew the measurement of the angle of descent because the tail-fin had left a well-defined imprint in the asphalt ground.²⁸⁹ They verified their result by looking at video footage and photographs of the market taken by local authorities after the explosion,²⁹⁰ by examining the manner in which shell fragments had dispersed after the explosion²⁹¹ and by confirming that this measured angle was sufficiently high to allow the mortar shell to land on the ground without colliding in flight with nearby obstacles, such as buildings or kiosks.²⁹²

iii. Defence Shelling Report

²⁸⁴ Ex. P2261 (UN Report) at p. 4.

²⁸⁵ Ex. P2261 (UN Report) at p. 12.

²⁸⁶ See footnote 249 of this Opinion.

²⁸⁷ Zečević, T. 10339 – 10340; Ex. P3276.1 (Zečević Ballistic Report) at p. 5 - 6.

²⁸⁸ Zečević, T. 10323; Ex. P3276.1 (Zečević Ballistic Report) at p. 5.

²⁸⁹ Zečević, T. 10345 – 10346. Hamdija Cavčić, another local investigator who did not belong to the Zečević Ballistic Experts’ team, examined the crater the day of the incident and also believed that the original position of the tail-fin in the ground could be determined even after extraction of the device because a permanent imprint had been left in the asphalt ground of the market. Ex. P3663.A (Witness statement of Hamdija Čavčić dated 16 November 1995).

²⁹⁰ Ex. P3276.1 (Zečević Ballistic Report) at p. 5.

²⁹¹ Ex. P3276.1 (Zečević Ballistic Report) at p. 5.

²⁹² Zečević, T. 10347.

81. Years after the incident, shelling experts called by the Defence attempted to determine the angle of descent of the device that had exploded at the market and published their results in a report dated 2002 (the “Defence Shelling Report”).²⁹³ They derived a complex equation relating the angle of descent of a 120 millimetre mortar shell to the size of the elliptical imprints left around the crater by the explosion of this shell.²⁹⁴ Using the dimensions of 56 centimetres by 26 centimetres of the elliptical imprints measured by local investigators on the day of the incident (the “Local Investigators”),²⁹⁵ they calculated that the angle of descent of the 120 millimetre shell had been between 55.6 and 62.5 degrees.²⁹⁶

b. Evidence regarding the speed of shell on impact

82. When a mortar shell impacts with sufficient speed, its tail-fin can remain embedded in the ground after the explosion of the shell²⁹⁷ as occurred after the incident in Markale market. When the make-up of the ground is known, the depth of penetration of the tail-fin can be measured and used to deduce the speed of the shell on impact because a higher speed on impact will result in a higher depth of penetration.²⁹⁸

83. A variety of sources confirmed that the ground of Markale market consisted of gravel stone covered by a layer of asphalt.²⁹⁹ The evidence regarding the depth of penetration of the tail-fin in the ground of the market comes from only one source though; the day after the incident, the Zečević Ballistic Experts measured, starting from the upper layer of the asphalt, that the tail-fin had

²⁹³ Ex. D1917 (Defence Shelling Report) at p. 51. The authors of this report assumed for purposes of their discussion that the device which exploded at the market was a 120 millimetre mortar shell, even though they ultimately concluded that it was unclear what type of device had caused the incident. Ex. D1917 (Defence Shelling Report) at p. 52 – 53 and 59.

²⁹⁴ Ex. D1917 (Defence Shelling Report) at p. 52 - 53. When a mortar shell detonates, “[w]hat happens is the [shell] explodes into numerous small pieces of hot metal which gouge out a pattern on the concrete or asphalt, or indeed on earth or mud, and in the case of concrete or asphalt, especially concrete, they are quite distinctive and they form two long wings, in the case of a mortar, away from the location of the explosion, back towards where the round came from, but at an angle, at a wide angle.” Hamill, T. 6092.

²⁹⁵ Viličić, T. 20560 - 20561; Ex. D1917 (Defence Shelling Report) at p. 53; Ex. P2309A.1 (Sabljica Ballistic Report) at p. 2.

²⁹⁶ Ex. D1917 (Defence Shelling Report) at p. 52 -53.

²⁹⁷ See for example Viličić, T. 20476; Zečević, T. 10296 – 10298.

²⁹⁸ See for example C-7 (Table of penetration velocities of the tail-fin of a 120 millimetre mortar shell according to different formulas) and C-8 (Table of penetration velocities of the tail-fin of a 120 millimetre mortar shell according to the Berezansky formula).

The depth of penetration will also depend on the firmness of the ground being penetrated. For a given speed on impact of a mortar shell for example, the depth of penetration of the tail-fin will be shallower in concrete than in a softer material such as clay. See C-8 (Table of penetration velocities of the tail-fin of a 120 millimetre mortar shell according to the Berezansky formula) and C-9 (Table of penetration velocities of the tail-fin of a 120 millimetre mortar shell according to the Berezansky formula).

²⁹⁹ Zečević, T. 10330; Sabljica, T. 5337; Ex. P2262 (Photographs taken of Markale market on 5 February 1994); Ex. D73 (Video footage of Markale market dated 6 February 1994); Ex. P2261.2 (Translation of Sergeant Dubant’s analysis of the crater in Markale market).

penetrated this ground to a depth which varied between 20 to 25 centimetres, depending on the extremities measured.³⁰⁰

84. From this depth of penetration, Dr. Zečević determined “that the [mortar shell that exploded at the market] must have had at the moment of impact a minimum velocity of 200 metres per second.”³⁰¹ One of the Defence shelling experts arrived at a result of the same order of magnitude when he concluded that the speed on impact of a 120 millimetre mortar shell would have required a speed of 268 metres per second to achieve the depth of penetration reported in the Zečević Ballistic Report.³⁰²

(iii) Discussion

85. Based on the above evidence, the Majority concludes that both the angle of descent and the speed on impact of the 120 millimetre mortar shell that exploded in Markale market can be determined beyond a reasonable doubt. With respect to the angle of descent, it observes that both Commandant Hamill's measurement of 53 to 62 degrees and Major Khan's value of 56 to 62 degrees substantially agree with the Zečević Ballistic Experts' finding of 55 to 65 degrees and the Defence shelling experts' calculation of 55.6 to 62.5 degrees. It reasons that such a convergence in the findings of different experts using different methodologies establishes conclusively that the angle of descent of the 120 millimetre mortar shell that exploded in the market was, at most, 65 degrees.³⁰³ The Majority also argues that the speed on impact of the shell can be reliably deduced from the report by the Zečević Ballistic Experts that the depth of penetration of the tail-fin was between 20 and 25 centimetres. If, as the Majority concludes, the angle of descent is at most 65 degrees and the depth of penetration is 20 to 25 centimetres, I would have to agree that the evidence in the Trial Record establishes beyond a reasonable doubt that the firing distance of the shell that exploded in the market was well over 2,600 metres, in SRK-controlled territory. I therefore now consider whether the evidence supports the Majority's conclusions about the reliability of those two values.

³⁰⁰ Zečević, T. 10331. Commandant Hamill testified that the depth of penetration of the tail-fin “was somewhat more [than 10 centimetres], perhaps 20, 30 centimetres, perhaps a little less” but did not elaborate on the manner in which he had arrived at such a figure or its accuracy. Hamill, T. 6189. Furthermore, the memorandum written by Commandant Hamill which summarised his crater analyses at the market and which was annexed to the UN Report made no reference to such a depth of penetration. Ex. P2261 (UN Report) at p. 18.

³⁰¹ Zečević, T. 10302.

³⁰² Vilicić, T. 20475 – 20476 and 20479 – 20480. To determine the speed on impact of the mortar shell, both the Defence shelling expert Dr. Vilicić and Dr. Zečević assumed that the projectile had been fired from an elevated position of at least 400 metres, which would increase the speed on impact of the projectile. See Vilicić, T. 20480 – 20481; Ex C-5 (Chart showing relationship between elevation and speed on impact of a mortar shell); Ex. P3276.1 (Zečević Ballistic Report) at p. 6.

³⁰³ Para. 469 of Judgment.

a. The angle of descent

86. In arriving at its conclusion about the angle of descent, the Majority invokes the measurements of 53 to 62 degrees and 56 to 62 degrees obtained by Commandant Hamill and Major Khan during the investigation conducted by the special UN team. This team, which was unaffiliated with either party to the conflict and which, in the Prosecution's words, was "highly qualified,"³⁰⁴ considered the results of Commandant Hamill and Major Khan, but concluded that their two measurements were "not sufficiently accurate to be used as a basis for a finding"³⁰⁵ because the tail-fin of the shell which had exploded in the market had been extracted from the ground before the angle of descent had been determined.³⁰⁶ By themselves, the results obtained by Commandant Hamill and Major Khan cannot therefore establish reliably the angle of descent since, in the special UN team's words, they are "not beyond suspicion."³⁰⁷

87. To dispel this suspicion, the Majority cites a third result obtained by the Zečević Ballistic Experts. The day after the explosion, these local explosive experts measured the angle of descent to be between 55 and 65 degrees by a method analogous to Commandant Hamill's insertion of a stick inside the crater in the market, though they used the tail-fin recovered after the explosion instead of a stick.³⁰⁸ According to the standards expressed in the UN Report for determining the angle of descent reliably, the results obtained by the Zečević Ballistic Experts are also suspect because these experts, like Commandant Hamill, took their measurement after the crater in the market had been disturbed by the extraction of the tail-fin from its original position in the ground. A Defence shelling expert openly expressed his scepticism about the Zečević Ballistic Experts' method of measurement, calling it "unacceptable."³⁰⁹

88. Thus, three out of the four results relied on by the Majority to establish the angle of descent have been assessed by both a special team of UN experts and by a Defence shelling expert as unsuitable to reach a finding. The fourth result, the calculation of 55.6 to 62.5 degrees by the Defence shelling experts, consequently plays a decisive role in confirming the Majority's conclusion that the angle of descent of the shell that landed in the market was no more than 65 degrees and deserves careful consideration. This need for a close examination is heightened

³⁰⁴ Prosecution Final Brief at p. 451. See also Hamill, T. 6077 – 6078 for a description of Commandant Hamill's qualifications.

³⁰⁵ See para. 79 of this Opinion.

³⁰⁶ During his testimony, Commandant Hamill did not indicate, or even suggest, that this conclusion of the UN Report could be challenged.

³⁰⁷ See para. 79 of this Opinion.

³⁰⁸ See para. 77 and 80 of this Opinion.

because, with respect to the other four scheduled shelling incidents, the Majority systematically dismissed the findings of the Defence shelling experts, judging them to be based on improper assumptions and erroneous interpretations of the evidence.³¹⁰ Reviewing attentively the Defence shelling experts' result concerning the angle of descent would also conform with the manner in which other findings by these experts about other technical aspects of the explosion at the market were assessed; for example, the Majority investigated in great detail, and ultimately dismissed, the conclusion reached by the Defence shelling experts about the speed on impact required for a 120 millimetre mortar shell to penetrate the ground of the market both at trial and in the Judgment.³¹¹

89. Curiously, the Majority refrained from such a detailed inquiry either at trial or in the Judgment. Instead, it describes in a few lines the result of the Defence shelling experts,³¹² accepting it as confirmation that the angle of descent could not have been higher than 65 degrees.³¹³ A careful examination of the Trial Record reveals though that these experts conducted their investigations years after the explosion and relied on measurements made by others in the immediate aftermath of the incident.³¹⁴ In particular, they arrived at a finding concerning the angle of descent by inserting into a complex equation the dimensions of elliptical imprints left by the explosion which had been measured by the Local Investigators.³¹⁵ These Local Investigators are the only source in evidence to have reported these dimensions and questions arise concerning the accuracy of their measurement. On the day of the explosion, they had also measured the depth of the crater, reporting a result of 9 centimetres.³¹⁶ Several days thereafter, UN shelling expert Chief-Sergeant Dubant examined the crater in the market, observing that it was still "very sharply defined,"³¹⁷ but found its depth to be greater, at 11 centimetres.³¹⁸ If inconsistencies arise in measuring the depth of a well-defined and self-contained crater, discrepancies can also emerge in determining the dimensions of elliptical imprints, which fan out over a wide area around the crater and grow faint and sparse on the outer rims.³¹⁹ Such errors in measuring the dimensions of the elliptical imprints would, in turn, affect the value of the angle of descent yielded by the complex equation used by the Defence shelling experts,

³⁰⁹ Vilicić, T. 20268.

³¹⁰ See for example para. 376 of Judgment with respect to scheduled shelling incident 1, footnote 1338 of Judgment with respect to scheduled shelling incident 2, para. 341 of Judgment with respect to scheduled shelling incident 3 and para. 408 of Judgment with respect to scheduled shelling incident 4.

³¹¹ See Vilicić, T. 20467 – 20487 and para. 444 and 480 of Judgment.

³¹² Para. 451 and 467 of Judgment.

³¹³ Para. 469 of Judgment.

³¹⁴ Para. 81 of this Opinion.

³¹⁵ Para. 81 of this Opinion.

³¹⁶ Ex. P2309A.1 (Sabljica Ballistic Report) at p. 2.

³¹⁷ Ex. P2261.2 (English translation of Chief-Sergeant's report) at p. 1.

³¹⁸ Ex. P2261 (UN Report) at p. 21 and 26.

³¹⁹ See for example p. 7 – 9 of Ex. P 2262 (Photographs taken in Markale market on 5 February 1994) and p. 26 of Ex. P2261 (UN Report).

but would do so in a manner which cannot be determined reliably from the evidence in the Trial Record.

90. The Majority nonetheless attempts to dispel the doubt about the reliability of the four results on which it relies by arguing that the shelling experts confirmed their findings by other means, such as examining visual evidence related to the tail-fin and the elliptical imprints left by the explosion.³²⁰ Photographs and videos depicting the tail-fin of the 120 millimetre mortar shell in its original position in the ground after the explosion provide only an approximate sense of the angle of descent though, given the uncertainties associated with the angle at which this visual information was recorded;³²¹ they do not for example conclusively rule out the slightly higher measurement of 68 to 73 degrees obtained by UN expert Major Russell. With respect to the elliptical imprints, a shelling expert called by the Prosecution testified that the degree of symmetry of the shape of the imprints left by the explosion of a mortar shell can help to ascertain the shell's angle of descent. He explained that the explosion of a mortar shell landing at a steep angle close to 90 degrees produces imprints in the ground which approximate the shape of a regular circle, while a lower angle of descent of the same projectile results in a more elongated and elliptical pattern.³²² This procedure for estimating visually the angle of descent of a mortar shell from the imprints in the ground produces only approximate results within a range of 20 or so degrees though,³²³ which again would not assist in eliminating the measurement of Major Russell. This last conclusion finds support in the work of the special UN team, which had seen the imprints left by the explosion in the market, but nonetheless concluded that the angle of descent could not be determined with the requisite accuracy.³²⁴

91. This issue of establishing accurately the angle of descent of the 120 millimetre mortar shell that exploded in Markale market is not academic. As described earlier, the firing distance of a 120 millimetre mortar shell decreases rapidly as the angle of descent of the shell increases. Such a distance could be as great as 6,464 metres, or well into SRK-controlled territory, if the angle of descent is about 55 degrees but shrinks to 1,168 metres, or well within ABiH-controlled territory, if the angle is about 86 degrees.³²⁵ Determining accurately the angle of descent becomes even more important given the fragmentary information available concerning the relationship between firing

³²⁰ Para. 443 and 467 of Judgment.

³²¹ Ex. P2262 (Photographs taken of Markale market on 5 February 1994); Ex. P2279A (Video footage of Markale market taken on 5 and 6 February 1994).

³²² Higgs, T. 12444 – 12446.

³²³ The Prosecution shelling expert Higgs applied this visual method for estimating the angle of descent to the first scheduled shelling incident and concluded that, in that instance, a mortar shell had landed at “a normal angle, probably somewhere between 50, 55 degrees and 70 degrees.” Higgs, T. 12467.

³²⁴ Chief-Sergeant Dubant drew a sketch of these imprints which was annexed to the UN Report. Ex. P2261 (UN Report) at p. 26.

³²⁵ Para. 74 of this Opinion.

distances of mortar shells and angles of descent. There is no evidence in the Trial Record indicating the firing distance of a 120 millimetre mortar shell when the angle of descent lies between 65 and 85 degrees.³²⁶ Therefore, a firing distance cannot be determined conclusively if, for example, the angle of descent of a 120 millimetre mortar shell that exploded at the market lies somewhere along the range of 67 to 73 degrees measured by Major Russell.

92. In an attempt to dismiss the possibility suggested by Major Russell's measurement that the angle of descent was higher than 65 degrees, the Majority argues that

the UN [R]eport ... ignored the measures made by [Major] Russell (68 – 73) degrees ... [and] endorsed the findings made by [Major] Khan and [Commandant] Hamill although it cautioned that on the basis of the condition of the crater it was not possible to estimate with any “acceptable degree of accuracy” the angle of descent.³²⁷

I respectfully submit that the Majority's argument misstates the evidence. As seen earlier, the special UN team did not “endorse” the measurements of Major Khan and Commandant Hamill but explicitly assessed that that they were “not sufficiently accurate to be used as a basis for a finding.”³²⁸ In addition, the special UN team did not indicate anywhere in its report that it had “ignored” the measurement of the angle of descent made by Major Russell, which is explicitly listed in a table of results.³²⁹

b. The speed of the shell on impact

93. As seen earlier, the speed on impact of a shell can be deduced from the depth of penetration of its tail-fin.³³⁰ In this incident, the value of that depth originates from only one source, a measurement obtained by the Zečević Ballistic Experts the day after the crater in the market had been excavated to extract the tail-fin. This action of digging to recover the tail-fin would have affected, and possibly have increased, the depth of penetration of the device measured by the Zečević Ballistic Experts just as it had compromised measuring the angle of descent. An actual depth of penetration shallower than the 20 to 25 centimetres reported by the Zečević Ballistic Experts would imply a smaller speed on impact which would, in turn, reduce the deduced value of the distance of fire of the mortar shell. For example, in ground similar to Markale market's, a depth

³²⁶ The Trial Record only indicates the firing distance of a 120 millimetre mortar shell when the angle of descent lies between 47.3 and 65 degrees and between 85.3 and 86.2 degrees. Ex. P3276.1 (Zečević Ballistic Report) at p. 6 and Ex. D1917 (Defence Shelling Report) at p. 5.

³²⁷ Para. 468 of Judgment.

³²⁸ Ex. P2261 (UN Report) at p. 12.

³²⁹ Ex. P2261 (UN Report) at p. 10. Furthermore, the special UN team indicated that another measurement taken by Major Russell, relating to the direction of fire, had been one of the eight measurements relied on to arrive at its estimate of the direction of fire. Ex. P2261 (UN Report) at p. 12.

³³⁰ Para. 82 of this Opinion.

of penetration of the tail-fin of a 120 millimetre mortar shell which is 3 centimetres shallower would lead, when the angle of descent remains constant at approximately 54 degrees, to a decrease in the firing distance of about 800 metres.³³¹

94. In sum, I find that there is uncertainty in the evidence concerning both of the elements necessary to deduce the firing distance of the shell that exploded in Markale market. With respect to the angle of descent, questions related to the reliability of the different methods used by the shelling experts suggest that this angle may have been higher than 65 degrees, perhaps in the 67 to 73 degrees range as measured by Major Russell. The evidence also suggests that the speed on impact of the shell was lower than the reported depth of penetration of the tail-fin of 20 to 25 centimetres would imply. The combination of such a lesser speed on impact with an angle of descent which is higher than 65 degrees would lead to a firing distance less than the values obtained by the Majority. The Trial Record does not disclose how much less though, given the fragmentary evidence about the relationship between firing distances and angles of descent as well as the uncertainty concerning the reliability of the measurements taken in the market after the incident. I therefore conclude that the evidence related to the angle of descent and speed on impact of the shell that exploded in Markale market does not allow to determine beyond a reasonable doubt whether the distance of fire of the projectile was more than 2,600 metres, in SRK-controlled territory.³³² I now consider whether other evidence might, nonetheless, identify conclusively the party responsible for this incident.

(iv) Other methods of determining the source of fire

a. Sound of firing

³³¹ More precisely, a depth of penetration of the tail-fin shallower by 3 centimetres would imply that the 120 millimetre mortar shell, immediately prior to impact, was traveling at a speed lower by $(28.6/5) \times 3 = 17.2$ metres per second. Ex. C-8 (Table of the speed of the tail-fin of a 120 millimetre mortar shell required to penetrate different materials). According to Table 2 of Ex. D1917, when the speed of a 120 millimetre mortar shell decreases from 220 to 203 metres per second – a difference of 17 metres per second – the firing distance of the projectile decreases from 5,780 to 4,948 metres – a difference of about 800 metres.

³³² As indicated in footnote 304, both Dr. Zecević and the Defense shelling expert Dr. Vilicić concluded that a 120 millimetre mortar shell would have needed to be fired from an elevation at least 400 metres higher than the market in order for its tail-fin to penetrate the ground to a depth of 20 to 25 centimetres. In order to show that the SRK held positions at least 400 metres higher up than the market, the Majority argues that the “confrontation line to the north-east of the market was at an altitude of some 400 metres higher [than the market]. Continuing in the same direction past the confrontation line, the ground further rose to reach heights of up to 500 to 650 metres above the market at around 2 – 2.5 kilometres past the line.” Para. 479 of Judgment. The Majority does not cite any evidence in the Trial Record in support of this topographic description.

The evidence does establish though that the SRK did not control all of the elevations in a northeastern direction from the market. See for example the area of Grdonj indicated on maps entitled “sniping incident 3” and “sniping incident 8” from Ex. P3728 (Maps marked by Vahid Karavelić); Ex. C-2 (Map of Sarajevo); Ex. P1790 (Map marked by Witness DP20); Ex. P1794 (Map marked by Vaso Nikolić); Ex. P1796 (Map marked by Witness DP53).

95. Witness AF testified that he was visiting his mother's house in Sedrenik, approximately 250 metres from the confrontation line at Spičasta Stijena, a ridge controlled by the SRK lying to the northeast of Markale market,³³³ when he heard a shell being fired from "[b]ehind Spičasta Stijena."³³⁴ According to several shelling experts called by the Prosecution, the sound made by the firing of a mortar can be used to determine an approximate direction of fire.³³⁵ Two of these experts cautioned that the distance of fire cannot be established reliably from this sound. The first testified that an observer hearing the sound of a mortar being fired "will not [be able] to determine a location, just [a] direction."³³⁶ The second concurred, explaining that the "[s]ound [made by the firing of a shell,] however, travels in funny ways and on its own would not confirm a firing position only an approximate direction."³³⁷ Witness AF's ability to determine the distance of firing from the sound he heard would also have been impeded by the hilly layout of Sedrenik³³⁸ and his avowed lack of familiarity with the fighting taking place there. He visited his mother in Sedrenik daily during the conflict³³⁹ but exclaimed, when asked whether the SRK and ABiH fought each other in the area, that "I couldn't really confirm [that such fighting was taken place in Sedrenik] because I do not know. I did not live there. Do you understand me? I used to live in Vratnik."³⁴⁰ Given this stated lack of familiarity with the area and the caution expressed by shelling experts about locating a source of fire from the firing sound of a mortar shell, I conclude that Witness AF's testimony does not help establish beyond a reasonable doubt that the source of fire of the shell that exploded in the market lay behind Spičasta Stijena in SRK-controlled territory, but only confirms that this projectile was fired from somewhere to the northeast.

b. Type of tail-fin recovered

96. The Zečević Ballistic Experts had suggested that the tail-fin of the 120 millimetre mortar shell that had been recovered at the market was of a type which the ABiH could not have possessed. They noticed that this tail-fin was not painted, despite the military manufacturing standards in effect in the JNA which required that a coloured coating be applied.³⁴¹ They concluded that this device had not been painted in order to save fuel, which suggested that it had been manufactured during

³³³ See for example Ex. P3668 (Map marked by Witness AF) for the location of Spičasta Stijena and its approximate distance to the house of Witness AF's mother.

³³⁴ Witness AF, T. 5500.

³³⁵ Hamill, T. 6193 – 6194; Kovacs, T. 11482 – 11484; Ex. P3734 (Shelling report of Richard Higgs dated 12 February 2002) at p. 6.

³³⁶ Hamill, T. 6193 – 6194.

³³⁷ Ex. P3734 (Shelling report of Richard Higgs dated 12 February 2002) at p. 6.

³³⁸ Ex. P3131 (Photographs of surrounding of the house of Witness AF's mother in Sedrenik).

³³⁹ Witness AF, T. 5499.

³⁴⁰ Witness AF, T. 5522.

³⁴¹ Zečević, T. 10361 – 10362; Ex. P3276.1 (Zečević Ballistic Report) at p. 4.

the conflict.³⁴² They also knew that the Marko Oreškočić factory in Lički Osik, Croatia, and the Pretis factory outside of Sarajevo in Vogošća suffered from fuel shortages during the conflict³⁴³ and concluded that the tail-fin had been manufactured in one of those two factories, to which the ABiH did not have access.³⁴⁴ Their conclusion is questionable. The Zečević Ballistic Experts did not explain how they had learned that those two factories suffered from such fuel shortages and this information is not corroborated elsewhere in the Trial Record. Furthermore, Dr. Zečević testified that he did not know whether, at the time of the explosion in the market, the ABiH had access to 120 millimetre mortar shells with unpainted tail-fins since he had stopped working for that army prior to 1994.³⁴⁵

(v) Conclusion

97. For the above reasons, I am not satisfied that the Prosecution has established beyond a reasonable doubt that the SRK fired the shell which exploded in Markale market on 5 February 1994. I do not reach this conclusion idly because the ABiH, as well as the SRK, had access during the conflict to 120 millimetre mortars,³⁴⁶ which are weapons which can be transported with relative ease.³⁴⁷ Finally, I note that my conclusion about the origin of fire also finds support in the special UN team's official finding, communicated to the UN Security Council, that there "is insufficient physical evidence to prove that one party or the other fired the mortar bomb."³⁴⁸

(b) Deliberateness of the firing of the mortar shell

98. Although I have concluded that the Prosecution has not established beyond a reasonable doubt that the SRK fired the shell which exploded in Markale market, I will examine, in order to complete my discussion of the incident, the three arguments raised by the Majority to justify its conclusion that this projectile had been fired deliberately. The market consisted of a rectangular area with dimensions of approximately 41 metres by 23 metres³⁴⁹ and the Majority argues that the evidence establishes that a target of this size "can be hit from a great distance with one shot if the

³⁴² Zečević, T. 10361 – 10362; Ex. P3276.1 (Zečević Ballistic Report) at p. 4.

³⁴³ Zečević, T. 10361 – 10362; Ex. P3276.1 (Zečević Ballistic Report) at p. 4.

³⁴⁴ During the conflict, the Pretis factory produced ammunition, including 120 millimetre mortar shells, for the VRS. Witness DP30, T. 16985 – 16986. The lack of access of the ABiH to munitions produced at the Marko Oreškočić factory in Lički Osik, Croatia is not established in the Trial Record. The Prosecution supports its contention that this factory "was occupied by Croatian Serb forces until the end of the war in 1995" by making reference to a witness statement which was not admitted into evidence. Prosecution Final Brief at para. 547.

³⁴⁵ Zečević, T. 10362.

³⁴⁶ Witness DP20, T. 15668; Golić, T. 14863; Ex. P2261 (UN Report) at p. 34.

³⁴⁷ Hamill, T. 6064; Witness DP20, T. 15668; Ex. P3675 (Description of weaponry in the former Yugoslavia) at p. 3.

³⁴⁸ Ex. D65 (Letter dated 15 February 1994 from UN Secretary-General to the UN Security Council).

³⁴⁹ Ex. D1917 (Defence Shelling Report) at p. 48.

area is pre-recorded.”³⁵⁰ This statement finds support in the written conclusions of a shelling expert called by the Prosecution who indicated that “it [would have been] distinctly possible to hit the market with a single initially sighted round”³⁵¹ and that this likelihood of striking the target would have been enhanced greatly if the market’s firing coordinates had been pre-recorded.³⁵² This expert added at trial though that weather conditions can affect the accuracy of a mortar shell “very badly”³⁵³ and that if a mortar has not been fired earlier during the day or the previous night at a particular pre-recorded target, its accuracy in hitting the latter would be only in the order of “within 100 metres.”³⁵⁴ According to this expert’s evidence then, the mortar that fired the shell responsible for the incident would be expected to have a degree of accuracy in that order since the evidence establishes that the market had not been shelled earlier that day.³⁵⁵ Other shelling experts called by both the Prosecution and the Defence expressed strong doubts about the ability of a single mortar to hit intentionally a target the size of Markale market from a significant distance. UN shelling expert Commandant Hamill spent several months in Sarajevo during the Indictment Period³⁵⁶ and witnessed the accuracy of shelling in the city. He concluded that if the market had indeed been targeted, it was a “fluke”³⁵⁷ that it had been hit with a single shell because a “mortar ... is not a terribly accurate weapon.”³⁵⁸ The Defence shelling experts corroborated Commandant Hamill’s conclusion and, using probability theory, calculated that the likelihood of hitting a target the size of Markale market with a single shell from a distance of 3,600 metres or more was “extremely small.”³⁵⁹ These conclusions accord with the everyday intuition that the trajectory of a small projectile, such as a 120 millimetre mortar shell, travelling at a high speed over a significant distance, would be affected by day-to-day variations such as changing wind conditions. I therefore conclude that it is very unlikely that Markale market, even if its firing coordinates had been pre-recorded, could have been hit intentionally on the day of the incident using only one shot.

³⁵⁰ Para. 494 of Judgment.

³⁵¹ Ex. P3734 (Shelling report by Richard Higgs) at p. 11.

³⁵² Ex. P3734 (Shelling report by Richard Higgs) at p. 11.

³⁵³ Higgs, T. 12582.

³⁵⁴ Higgs, T. 12583.

³⁵⁵ A resident of the northeastern part of the city explained that there had been “no shelling the whole morning of [5 February 1994] so that everybody went about their chores, going to the market to buy something.” Witness AK-1, T. 5452.

The Prosecution argues that the UN Report “includes a ‘inprep’ (incoming report) which indicates that between 0530-0535 that morning, four mortar rounds were fired into the grid square beside the Markale area.” Prosecution Final Brief at para. 559. No information is provided though in the ‘inprep’ on the identity of the party or parties responsible for the firing of these shells. Furthermore, the Trial Record does not disclose whether the firing of shells somewhere in “the grid square beside the Markale area,” and not in the grid square where the market itself was located, would permit the weapon calibration necessary to hit the market using a single shell seven hours later.

³⁵⁶ Hamill, T. 6060.

³⁵⁷ Hamill, T. 6191.

³⁵⁸ Hamill, T. 6191.

³⁵⁹ Ex. D1917 (Defence Shelling Report) at p. 56.

99. The Majority invokes a second argument to justify its conclusion, explaining that UN representative Afzaal “Niaz testified that in the four months preceding the incident in Markale market, about 10 to 12 mortar shells fell around Markale market and that most of them were of a 120 mm calibre and originated from the direction north-northeast of Sedrenik.”³⁶⁰ For the above-stated reasons having to do with the effect of day-to-day fluctuations on firing accuracy, the Niaz’ testimony about prior shelling incidents occurring over several months does not establish that it would have been possible to hit Markale market using a single shell on 5 January 1994. Furthermore, I note that Niaz’ tally of previous incidents in the area includes shells which fell as far as 200 metres from the market.³⁶¹

100. The third and final argument raised by the Majority relates to the SRK’s absence of cooperation in investigating shelling incidents in the northeastern quadrant of the city. It states that the “UNMOs who wanted to investigate [the shelling incidents referred to by Niaz] were not authorised access to the northeast area of the city controlled by the SRK.”³⁶² In the aftermath of the explosion in the market though, the special UN team was able to interview an SRK officer, who disclosed that the SRK had positioned 120 millimetre mortars in the northeastern quadrant of the city.³⁶³ The special UN team also commented on the cooperation provided by the ABiH, remarking that while it had been invited by that army to visit two of its 120 millimetre mortar positions, both of these positions “were located outside the estimated direction of fire [of the shell that had exploded in the market.]”³⁶⁴ The special UN team added that “the visit [to these two positions] was orchestrated by the [A]BiH, and UN personnel were shown only what the [A]BiH had prepared in advance to show them.”³⁶⁵

101. From the above, I conclude that the evidence concerning the targeting accuracy of a mortar and the level of cooperation provided by the SRK does not establish that the shell which exploded on 5 February 1994 was deliberately aimed at Markale market.

14. Unscheduled incidents

(a) Koševo hospital

102. The Majority concludes that “the evidence does reveal that, on occasions, the Koševo Hospital buildings themselves were directly targeted, resulting in civilian casualties, and that this

³⁶⁰ Para. 494 of Judgment.

³⁶¹ Niaz, T. 9099.

³⁶² Para. 494 of Judgment.

³⁶³ Ex. P2261 (UN Report) at p. 34.

³⁶⁴ Ex. P2261 (UN Report) at p. 34.

³⁶⁵ Ex. P2261 (UN Report) at p. 34.

fire was certainly not aimed at any possible military target.”³⁶⁶ I respectfully dissent from this conclusion. As noted in the Judgment, there is conclusive evidence that mortars fired from within the hospital.³⁶⁷ The Trial Record also discloses that the ABiH had positioned military assets such as tanks in a building complex located immediately across the street from the hospital complex.³⁶⁸ As the Majority acknowledges, the evidence concerning the frequency of exchanges between these mortars and other military assets and the SRK is fragmentary, so that “it is not possible for the Majority to establish what damage and which casualties may have resulted from”³⁶⁹ these exchanges. For these reasons, I conclude that the evidence fails to establish beyond a reasonable doubt that Koševo hospital was deliberately targeted by the SRK during the Indictment Period in the absence of any military target.

15. Conclusion

103. Despite my aforementioned disagreements with certain of the Majority’s factual findings, I share in the conclusion that the Prosecution has established beyond a reasonable doubt that, in a number of instances, the SRK either deliberately or recklessly fired at civilians in Sarajevo during the Indictment Period.

D. Conduct of a campaign

104. I now consider whether the SRK conducted a campaign of purposefully targeting civilians in Sarajevo throughout the Indictment Period by examining issues related to the number of persons killed.³⁷⁰ I recognize the potential for such a discussion, in its mathematical abstraction of the underlying human suffering, to be misinterpreted as trivializing the individual stories of hardship and sorrow told by every resident of Sarajevo who testified before the Trial Chamber.

105. As seen earlier, the number of persons living in Sarajevo during the conflict was in the order of 340,000, including 45,000 soldiers posted inside the city.³⁷¹ The Prosecution presented evidence in the form of a report from three demographic experts regarding the number of these residents injured or killed during the 23 months of the Indictment Period in ABiH-controlled areas. After reviewing extensive sources, the experts concluded that a minimum of 5,093 civilians had been

³⁶⁶ Para. 509 of Judgment. As the Prosecution correctly observes, international humanitarian law permits attacks on hospitals if specific conditions are satisfied. Prosecution Final Brief at para. 608 – 615. Since the Majority does not refer to these conditions, I understand that its reference to shelling incidents involving Koševo hospital should be understood as attacks directed against civilian persons and not as strikes launched against the hospital as such.

³⁶⁷ Para. 504 - 506 of Judgment.

³⁶⁸ Witness DP51, T. 13589 – 13590, 13592 and 13607 – 13608; Witness DP34, T. 17825 – 17826.

³⁶⁹ Para. 509 of Judgment.

³⁷⁰ In doing so, I am mindful that the word “campaign” as used in the Judgment broadly covers “military actions in the area of Sarajevo during the Indictment Period involving widespread or systematic shelling and sniping of civilians resulting in their death or injury.” Para. 181 of Judgment.

injured and a minimum 1,399 civilians had been killed due to shelling and shooting,³⁷² although they did not specify the fraction of these casualties which had resulted from deliberate targeting. They also concluded that the minimum total number of civilians and soldiers killed was 3,798 and estimated that this figure understated by about 600 the actual total number of persons killed.³⁷³ Civilian casualties were not spread uniformly over the Indictment Period and fell significantly over time. The monthly number of civilians killed was 105 during the last four months of 1992 and decreased to 63.50 for 1993.³⁷⁴ This monthly average fell further to 28.33 in the first 6 months of 1994, though the Prosecution's experts warned that this last figure probably understated the true average due to the limitations of the sources consulted.³⁷⁵

106. An army characterized by the level of competence and professionalism ascribed to the SRK by the Prosecution³⁷⁶ would be expected, when conducting during 23 months a campaign of purposefully targeting civilians living in a city of 340,000, to inflict a high number of civilian casualties in relation to the city's total population, accompanied by high monthly averages of civilians killed. The results obtained by the Prosecution's demographic experts indicate otherwise. As seen above, the figures for civilians injured and killed were on the order of 5,093 and 1,399, respectively, in a city of 340,000 inhabitants which had been the focal point of an ongoing war during the 23 months of the Indictment Period. Furthermore, the monthly number of civilian casualties dropped significantly over this same period.³⁷⁷ I therefore conclude that the evidence does not establish that the SRK conducted a campaign of purposefully targeting civilians in the city throughout the Indictment Period.

107. My conclusion finds support in the evidence regarding the conduct of the SRK leadership, which relinquished voluntarily control of the airport, authorized the establishment of "blue routes" to allow for the distribution of humanitarian supplies in the city,³⁷⁸ entered into anti-sniping agreements and agreed to the establishment of the TEZ. Furthermore, I note that Serbian authorities affiliated with the SRK in Bosnia-Herzegovina entered into two agreements and issued two declarations at the beginning of the Indictment Period, including one dated 13 May 1992, stating their commitment to abide by the principles of international humanitarian law.³⁷⁹ According to one

³⁷¹ Para. 9 of this Opinion.

³⁷² Ex. P3731 (Expert report by Ewa Tabeau and others) at p. 5.

³⁷³ To be precise, these authors estimated that the total actual number of Muslims killed in ABiH-controlled territory during the Indictment Period was 4,352. Ex. P3731 (Expert report by Ewa Tabeau and others) at p. 48.

³⁷⁴ Ex. P3731 (Expert report by Ewa Tabeau and others) at p. 27.

³⁷⁵ Ex. P3731 (Expert report by Ewa Tabeau and others) at p. 27. No corresponding figures were provided for the monthly number of civilians injured.

³⁷⁶ See for example Prosecution Final Brief at para. 137.

³⁷⁷ The survival skills developed by civilians in Sarajevo would account for part of this significant decrease.

³⁷⁸ Para. 7 and 13 of this Opinion.

³⁷⁹ Para. 123 - 124 of Judgment.

SRK soldier, the 13 May 1992 declaration, issued by the Presidency of Republika Srpska, had been read out to SRK troops and had been implemented “to a high extent”³⁸⁰ during the conflict.

E. Considerations related to the applicable law

1. Terror against the civilian population as a violation of the laws or customs of war

108. The Majority finds that the Trial Chamber has jurisdiction by way of Article 3 of the Statute to consider the offence constituted of “acts of violence wilfully directed at a civilian population or against individual civilians causing death or serious injury to body or health of individual civilians[,] with the primary purpose of spreading terror among the civilian population.”³⁸¹ I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal.

109. In his Report to the Security Council regarding the establishment of the Tribunal, the Secretary-General explained that “the application of the [criminal law] principle of nullum crimen sine lege requires that the international tribunal should apply rules which are beyond any doubt part of customary law.”³⁸² The Secretary-General’s Report therefore lays out the principle that the Tribunal cannot create new criminal offences, but may only consider crimes already well-established in international humanitarian law. Such a conclusion accords with the imperative that “under no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalizing an act which had not until the present time been regarded as criminal.”³⁸³

110. In a recent decision, the Appeals Chamber considered this principle to determine the circumstances under which an offence will fall within the jurisdiction of the Tribunal. It concluded that “the scope of the Tribunal’s jurisdiction *ratione materiae* [or subject-matter jurisdiction] may ... be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.”³⁸⁴ With respect to *ratione personae* or personal jurisdiction, the Appeals Chamber found that the Secretary-General’s Report did not contain any express

³⁸⁰ Witness AD, T. 10686 – 10687.

³⁸¹ Para. 138 of Judgment.

³⁸² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) at para. 34. See also *Ojdanić* Interlocutory Appeal Decision at para. 9.

³⁸³ *Vasiljević* Trial Judgment at para. 196.

³⁸⁴ *Ojdanić* Interlocutory Appeal Decision at para. 9.

limitation concerning the nature of the law which the Tribunal may apply, but concluded “that the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal’s jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.”³⁸⁵

111. Thus, an offence will fall within the jurisdiction of the Tribunal only if it existed as a form of liability under international customary law. When considering an offence, a Trial Chamber must verify that the provisions upon which a charge is based reflect customary law. Furthermore, it must establish that individual criminal liability attaches to a breach of such provisions under international customary law at the time relevant to an indictment in order to satisfy the *ratione personae* requirement. Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, a Trial Chamber must finally confirm that this offence was defined with sufficient clarity under international customary law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.³⁸⁶

112. The Accused is charged pursuant to Article 3 of the Statute with “unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949.”³⁸⁷ Since such an offence has never been considered before by this Tribunal, it would seem important to determine whether this offence existed as a form of liability under international customary law in order to confirm that it properly falls within the jurisdiction of this Trial Chamber. The Majority repeatedly retreats from pronouncing itself though on the customary nature of this offence and, in particular, does not reach any stated conclusion on whether such an offence would attract individual criminal responsibility for acts committed during the Indictment Period under international customary law.³⁸⁸ Instead, it argues that such individual criminal responsibility attaches by operation of conventional law.³⁸⁹ In support of this conclusion, it observes that the parties to the conflict had entered into an agreement dated 22 May 1992 in which they had committed to abide by Article 51 of the Additional Protocol I,

³⁸⁵ *Ojdanić* Interlocutory Appeal Decision at para. 10.

³⁸⁶ *Vasiljević* Trial Judgment at para. 201.

³⁸⁷ Count 1 of the Indictment.

³⁸⁸ Para. 97 and 113 of Judgment.

³⁸⁹ Para. 127 of Judgment. The Majority apparently interprets the *Tadić* Jurisdiction Decision to mean that an offence may fall under the jurisdiction of the Tribunal, even if it did not exist as a form of liability under international customary law, by application of any treaty which was unquestionably binding on parties at the time of the alleged offence and which was not in conflict or derogated from peremptory norms of international law. Such an interpretation departs from the established jurisprudence of the Tribunal, as previous Trial Chambers and the Appeals Chamber have consistently sought confirmation that a particular offence existed as a form of liability under international customary law before concluding that it fell within the jurisdiction of the Tribunal. See for example *Vasiljević* Trial Judgment at para. 193 *et seq.*; *Krnolejac* Trial Judgment, para. 177 *et seq.* and para. 350 *et seq.*; *Kunarać et al.* Trial Judgment at para. 518 *et seq.*; *Čelibići* Trial Judgment at para. 414 – 418; *Kunarać et al* Appeal Judgment at para. 124 and 146 – 148; *Furundžija* Appeal Judgment at para. 111.

particularly with respect to the second part of the second paragraph of that article which prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."³⁹⁰

113. The signing of the 22 May Agreement does not suffice though to satisfy the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law. Even if I accepted – *quod non* - that the Trial Chamber has the necessary *ratione materiae* to consider the offence of inflicting terror on a civilian population by virtue of the signing of the 22 May Agreement, the *ratione personae* requirement would still have to be satisfied, meaning that this offence must have attracted individual criminal responsibility under international customary law for acts committed at the time of the Indictment Period.³⁹¹ The Prosecution and the Majority cited few examples indicating that the criminalization of such an offence was an admitted state practice at such a time.³⁹² In my view, these limited references do not suffice to establish that this offence existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law. I therefore conclude that the offence of inflicting terror on a civilian population does not fall within the jurisdiction of this Trial Chamber. By concluding otherwise without establishing that the offence of inflicting terror on a civilian population attracted individual criminal responsibility under international customary law, the Majority is furthering a conception of international humanitarian law which I do not support.

F. Legal Findings

1. Article 3

114. I share in the conclusion that the crime of attacks on civilians falling within the meaning of Article 3 of the Statue was committed against the civilian population of Sarajevo by SRK soldiers during the Indictment Period.³⁹³

³⁹⁰ See para. 96 of Judgment quoting Article 51(2) of the Additional Protocol I and the 22 May Agreement.

³⁹¹ The Geneva Conventions and Additional Protocols provide rules regarding the conduct of hostilities during a conflict. Violations of only a selected number of these provisions are described as “grave breaches” by these instruments and entail individual criminal responsibility. See for example Article 147 of the 1949 Geneva Convention IV and Article 85 of Additional Protocol I.

³⁹² See for example para. 114 – 122 and 126 of Judgment and Prosecution Pre-Trial Brief at para. 141.

³⁹³ Para. 596 of Judgment

2. Article 5

115. I share in the conclusion that the crimes of murder and inhumane acts falling within the meaning of Article 5 of the Statute were committed by SRK soldiers in Sarajevo during the Indictment Period.³⁹⁴

3. Article 7

(a) Article 7(1)

116. The Majority concludes that the Accused ordered his forces to attack civilians in Sarajevo deliberately, thereby finding him criminally responsible under Article 7(1) of the Statute.³⁹⁵ This conclusion rests entirely on inferences, since no witness testified to hearing the Accused issue such orders and no written orders were tendered which would indicate that he so instructed his troops. The evidence, in fact, explicitly supports a conclusion that the Accused did not order such attacks. For example, he personally instructed his troops in writing to respect the Geneva Conventions and other instruments of international humanitarian law.³⁹⁶ This written evidence echoes the testimonies of 16 SRK soldiers and officers posted throughout Sarajevo during the Indictment Period, who confirmed that they had received orders not to target civilians.³⁹⁷ Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces.³⁹⁸ I conclude therefore that the Trial Record does not support a finding that the Accused issued orders to attack civilians in Sarajevo deliberately and dissent from the Majority's conclusion that he incurs criminal responsibility under Article 7(1) of the Statute.

117. I also respectfully submit that the Majority drew improper inferences from the available evidence. For example, it argues that UN representative Patrick Henneberry, who was called to testify by the Prosecution, had witnessed the Accused threatening "to either destroy the city or rid it of Muslims"³⁹⁹ at a meeting held on 16 December 1992. This utterance impressed Henneberry sufficiently for him to remember it many years after the meeting and repeat it at trial.⁴⁰⁰ Strangely enough, he did not write this alleged threat made by the Accused in the diary which he kept while

³⁹⁴ Para. 598 – 599 of Judgment.

³⁹⁵ Para. 749 of Judgment.

³⁹⁶ See for example Ex. D205.1 (Order signed by General Galić dated 15 May 1993) and Ex. D1492.1 (Order signed by General Galić dated 15 September 1993).

³⁹⁷ Those witnesses are Witness DP4, Witness DP5, Witness DP6, Witness DP8, Witness DP9, Witness DP10, Witness DP11, Witness DP14, Witness DP16, Witness DP17, Witness DP20, Witness DP23, Witness DP34, Gordan Vuković, Siniša Krsman and Vaso Nikolić.

³⁹⁸ Ex. D201.1 (Letter from General Galić to UNPROFOR dated 28 November 1992) and Ex. D255.1 (Order signed by General Galić dated 20 August 1993).

³⁹⁹ Para. 745 of Judgment.

posted in Sarajevo⁴⁰¹ or in any of the other documents he provided to the Prosecution.⁴⁰² Furthermore, another UN representative who attended this meeting of 16 December 1992 did not indicate during his testimony that the Accused had issued such a threat.⁴⁰³

118. In another instance, the Majority argues that UN representative Hussein Abdel-Razek provided evidence regarding shooting taking place at the airport that would support the conclusion that SRK troops had been ordered to fire “either in a deliberately indiscriminate manner or specifically against civilians.”⁴⁰⁴ It explains that Abdel-Razek testified that the Accused admitted during a meeting “that civilians who crossed the airport tarmac were targeted because he had doubts that those movements might be for a military purpose.”⁴⁰⁵ Abdel-Razek’s exact words were as follows:

Q. Did you ever protest yourself to General Galić about civilians being shot as they crossed the airfield by his forces?

A. Yes, I did talk about this with him. And he was adamant on the fact that he will continue to stop this movement by all means, using all means. And he said the other party should put an end to these activities, and apparently he did have some doubt as to those movements. They might be for military purposes.⁴⁰⁶

The Accused’s “admission” therefore related to his attempt to stop the “activities” for “military purposes” taking place at the airport, which the SRK had voluntarily placed under the control of the UN to ship humanitarian supplies but which was misused to allow enemy soldiers, some dressed as civilians, to enter the city.⁴⁰⁷

119. Finally, when examining the jurisprudence of the Tribunal relevant to the elements of the various heads of individual criminal responsibility under Article 7(1), the Majority had explained that the act of ordering refers “to a person in a position of authority using that authority to instruct

⁴⁰⁰ Henneberry, T. 8590 – 8591.

⁴⁰¹ Henneberry, T. 8677.

⁴⁰² Henneberry, T. 8680.

⁴⁰³ This UN representative recalled only that “there was a general perception that other events within Bosnia were key pressure points which, if events were not going according to the Serb side’s plans, the city of Sarajevo, which was to all intents and purposes in a hostage situation, would be used as a counter pressure point for the events elsewhere in Sarajevo.” Mole, T. 10988.

⁴⁰⁴ Para. 743 of Judgment.

⁴⁰⁵ Para. 743 of Judgment.

⁴⁰⁶ Abdel-Razek, T. 11596.

⁴⁰⁷ Para. 13 of this Opinion. The Majority also argues that the testimony of SRK soldier Witness DP35 helps establish that SRK troops fired “either in a deliberately indiscriminate manner or specifically against civilians” in the area of the airport. Para. 743 of Judgment. I respectfully submit that the Majority’s interpretation of the evidence is incorrect. Witness DP35 was questioned extensively about the shooting taking place in the area of the airport and explained that the SRK believed that some of the persons in that area were trying to smuggle explosives into the city; he remembered in particular that on one occasion in March 1993, a lorry containing ammunition had exploded after being hit at night as it tried to cross the runway. Witness DP35, T. 17670 – 17671. Witness DP35 also testified that SRK soldiers posted in the area did not have night-sights and could not tell if, among the soldiers crossing the runway, there were civilians. Witness DP35, T. 17604 – 17605.

another to commit an offence.”⁴⁰⁸ It had then explained that where a superior “under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by ... culpable omissions, directly participated in the commission of crimes through one or more of the modes of participation described in Article 7(1).”⁴⁰⁹ Such an interpretation of Article 7(1) then does not exclude the possibility that a superior may be deemed to have “ordered” a subordinate to commit a crime by “culpable omission.” This latter notion, though understated, exerts on the Majority’s conclusion concerning the Accused’s criminal responsibility a perceptible influence which can be felt throughout its prose. For example, the Majority argues that

[t]he evidence is compelling that *failure to act* for a period of approximately twenty-three months by a corps commander who has substantial knowledge of crimes committed against civilians by his subordinates and is reminded on a regular basis of his duty to act upon that knowledge *bespeaks of a deliberate intent to inflict acts of violence on civilians*.⁴¹⁰

In another instance, the Majority argues in the very paragraph where it concludes that the Accused ordered the crimes proven at trial that

the evidence impels the conclusion that General Galić, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) *failed to prevent the commission of a crime* and punish the perpetrators thereof upon that knowledge, *furthered* a campaign of unlawful acts of violence against civilians ... and ... *intended to conduct* that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo.⁴¹¹

According to the Majority therefore, the Accused’s “failure to act” or “failure to prevent the commission of a crime” during the Indictment Period contributes to the conclusion that he ordered the commission of the crimes proven at trial. I fail to understand though how the Accused may be found responsible for ordering the commission of a crime on the basis of his failure to act or of an omission, be it a “culpable one.”

(b) Article 7(3)

120. The elements of individual criminal responsibility under Article 7(3) of the Statute are firmly established by the jurisprudence of the Tribunal. Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates: (1) the existence of a

⁴⁰⁸ Para. 168 of Judgment.

⁴⁰⁹ Para. 170 of Judgment.

⁴¹⁰ Para. 745 of Judgment (emphasis added).

superior-subordinate relationship, (2) the superior knew or had reason to know that the subordinate was about to commit such acts or had done so, and (3) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.⁴¹² I am satisfied that the Trial Record establishes that all three conditions have been met⁴¹³ and conclude that the Accused is guilty of the crimes of unlawful attacks against civilians, murder and inhumane acts under Article 7(3) of the Statute.

G. Sentencing

121. The Majority considers that “the fact that General Galić occupied the position of VRS Corps commander, and repeatedly breached his public duty from this very senior position, is an aggravating factor”⁴¹⁴ with respect to his sentencing. Since the Majority has also found the Accused responsible under Article 7(1) of “having ordered the crimes proved at trial,”⁴¹⁵ I respectfully submit that considering his position as a military commander as an aggravating circumstance is analogous to concluding that being a husband is an aggravating circumstance with respect to the crime of uxoricide.

122. In my view, the Majority also does not sufficiently consider the difficulty faced by the Accused in conducting a war in the urban environment of Sarajevo.⁴¹⁶ To repeat the words of a UN representative posted in Sarajevo during the conflict, the dense military presence within a civilian population made the conduct of such a war “a soldier’s worst nightmare.”⁴¹⁷

⁴¹¹ Para. 749 of Judgment (emphasis added).

⁴¹² *Krnojelac* Trial Judgment at para. 92.

⁴¹³ See for example para. 615 – 619, 657, 667 – 668, 677 – 678, 711 and 714 of Judgment.

⁴¹⁴ Para. 765 of Judgment.

⁴¹⁵ Para. 749 of Judgment.

⁴¹⁶ See for example paras 9 - 14 of this Opinion.

⁴¹⁷ Fraser, T. 11238.

123. I would sentence General Galić to ten years' imprisonment.

Done in English and French, the English being authoritative.

Rafael Nieto-Navia
Judge

Done this fifth day of December 2003
At The Hague
The Netherlands

[Seal of the Tribunal]