A. Trial Chamber, Judgement and Opinion - Paras 1 to 3

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: ICTY, Prosecutor v. Stanislav Galic, Judgement and opinion, Trial Chamber, 5 December 2003; IT-98-29-T; available on www.icty.org. Footnotes partially omitted]

IN TRIAL CHAMBER I

Judgement of:

5 December 2003

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT AND OPINION

I. INTRODUCTION

1. Trial Chamber I of the International Tribunal (the “Trial Chamber”) is seized of a case which concerns events surrounding the military encirclement of the city of Sarajevo in 1992 by Bosnian Serb forces. [...]
2. In the course of the three and a half years of the armed conflict in and around Sarajevo, [...] Major-General Stanislav Galić, [...] was the commander for the longest period, almost two years, from around 10 September 1992 to 10 August 1994. The Prosecution alleges that over this period he conducted a protracted campaign of sniping and shelling against civilians in Sarajevo. [...]

Paras 11 to 177

II. APPLICABLE LAW

1. Prerequisites of Article 3 of the Statute [...]

1. According to the [...] Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions ("the *Tadić* conditions") must be satisfied: [**See** ICTY, The Prosecutor v. Tadic [Part A.]]
    i. the violation must constitute an infringement of a rule of international humanitarian law;
    ii. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
    iii. the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
    iv. the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]
2. The Indictment charges the Accused with violations of the laws or customs of war under Article 3 of the Statute, namely with one count of "unlawfully inflicting terror upon civilians" (Count 1) and with two counts of "attacks on civilians" (Counts 4 and 7) pursuant to Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949. These offences are not expressly listed in Article 3 of the Statute. Starting with the crime of attack on civilians, the Trial Chamber will determine whether the offence can be brought under Article 3 of the Statute by verifying that the four *Tadić* conditions are met. The Trial Chamber will also inquire into the material and mental elements of the offence. It will then repeat this exercise for the crime of terror.

2. Attack on Civilians as a Violation of the Laws or Customs of War [...]

(b) First and Second Tadić Conditions

1. Counts 4 and 7 of the Indictment are clearly based on rules of international humanitarian law, namely Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. Both provide, in relevant part, that: "The civilian population as such, as well as individual civilians, shall not be made the object of attack." The first *Tadić* condition, that the violation must constitute an infringement of a rule of international humanitarian law, is thus fulfilled.
2. As for the second *Tadić* condition, that the rule must be customary in nature or, if it belongs to treaty law, that the required conditions must be met, the Prosecution claims that the parties to the conflict were bound by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II as a matter of both treaty law and customary law. [...]
3. The jurisprudence of the Tribunal has already established that the principle of protection of civilians has evolved into a principle of customary international law applicable to all armed conflicts. Accordingly, the prohibition of attack on civilians embodied in the above-mentioned provisions reflects customary international law.
4. Moreover, as explained below, the same principle had also been brought into force by the parties by convention. [...]
5. The Trial Chamber does not deem it necessary to decide on the qualification of the conflict in and around Sarajevo. It notes that the warring parties entered into several agreements under the auspices of the ICRC. The first of these was the 22 May Agreement, [**See** Former Yugoslavia, Special Agreements

Between the Parties to the Conflicts [Part B.]] by which the parties undertook to protect the civilian population from the effects of hostilities and to respect the principle prohibiting attacks against the civilian population. With regard to the conduct of hostilities, they agreed to bring into force, *inter alia*, Articles 35 to 42 and 48 to 58 of Additional Protocol I. [...]

(c) Third Tadić Condition [...]

1. The act of making the civilian population or individual civilians the object of attack [...], resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I. It would even qualify as a grave breach of Additional Protocol I. It has grave consequences for its victims. The Trial Chamber is therefore satisfied that the third *Tadić* condition is fulfilled.

(d) Fourth Tadić Condition

1. In accordance with the fourth *Tadić* condition, a violation of the rule under examination must incur, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
2. The Appeals Chamber has found that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." [**See** ICTY, The Prosecutor v. Tadic, [Part A.]] It has further expressly recognized that customary international law establishes that a violation of the principle prohibiting attacks on civilians entails individual criminal responsibility. [**See** The Prosecutor v. Strugar [Part A., para. 10]]
3. It should be noted that the intention of the States parties to Additional Protocol I to criminalize violations of Article 51(2) of Additional Protocol I is evidenced by the fact, mentioned above, that an attack on civilians is considered a grave breach of the Protocol, as defined by Article 85(3)(a) therein. The Trial Chamber has also noted that the "Programme of Action on Humanitarian Issues" [i.e. identical unilateral declarations signed by the parties at a conference held in London on 27 August 1992] recognized that those who committed or ordered the commission of grave breaches were to be held individually responsible.
4. Moreover, national criminal codes have incorporated as a war crime the violation of the principle of civilian immunity from attack. This war crime was punishable under Article 142 of the 1990 Penal Code of the Socialist Federal Republic of Yugoslavia. In the Republic of Bosnia-Herzegovina it was made punishable by a decree-law of 11 April 1992. National military manuals also consistently sanction violations of the principle. [...]

(e) Material and Mental Elements [...]

(ii) Discussion [...]

1. [...] In the Blaskić case [**See** ICTY, The Prosecutor v. Blaskic] the Trial Chamber observed in relation to the *actus reus* that "the attack must have caused deaths and/or serious bodily injury within the civilian

population or damage to civilian property. [...] Targeting civilians or civilian property is an offence when not justified by military necessity." On the *mens rea* it found that "such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". [...]

2. The Trial Chamber does not however subscribe to the view that the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is adequately described as "targeting civilians when not justified by military necessity". This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity. [...]
3. [...] According to Article 50 of Additional Protocol I, "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I." For the purpose of the protection of victims of armed conflict, the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.
4. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I is suspended when and for such time as they directly participate in hostilities. To take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces. [...]
5. The presence of individual combatants within the population does not change its civilian character. In order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly. In certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status. The Commentary to Additional Protocol I explains that the presumption of civilian status concerns "persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked". The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.
6. As mentioned above, in accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked. A widely accepted definition of military objectives is given by Article 52 of Additional Protocol I [...].
7. In light of the discussion above, the Trial Chamber holds that the prohibited conduct set out in the first part of Article 51(2) is to direct an attack (as defined in Article 49 of Additional Protocol I) against the civilian population and against individual civilians not taking part in hostilities.
8. The Trial Chamber will now consider the mental element of the offence of attack on civilians, when it results in death or serious injury to body or health. Article 85 of Additional Protocol I explains the intent required for the application of the first part of Article 51(2). It expressly qualifies as a grave breach the act of *wilfully* "making the civilian population or individual civilians the object of attack". The Commentary to Article 85 of Additional Protocol I explains the term as follows:

wilfully: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.

The Trial Chamber accepts this explanation, according to which the notion of "wilfully" incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully".

1. For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.
2. In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:
    1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
    2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. [...] [T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts.
4. One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack. [...]
5. The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.
6. As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the

maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack. [...]

3. Terror against the Civilian Population as a Violation of the Laws or Customs of War [...]

(c) Discussion [...]

(i) Preliminary remarks

1. [...] In its interpretation of provisions of the Additional Protocols and of other treaties referred to below, the Majority will apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, namely that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." No word in a treaty will be presumed to be superfluous or to lack meaning or purpose.
2. The Majority also acknowledges the importance of the principle found in Article 15 of the 1966 International Covenant on Civil and Political Rights, which states, in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations."
3. The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means "that penal statutes must be strictly construed" and that the "paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object." [...]

(ii) First and Second Tadić Conditions [...]

1. Thus the first two *Tadić* conditions are met: Count 1 bases itself on an actual rule of international humanitarian law, namely the rule represented by the second part of the second paragraph of Article 51 of Additional Protocol I. As for the rule's applicability in the period covered by the Indictment, the rule had been brought into effect at least by the 22 May Agreement, which not only incorporated the second part of 51(2) by reference, but repeated the very prohibition "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" in the agreement proper.
2. The Majority emphasizes that it is not required to pronounce on whether the rule in question is also customary in nature. As stated above, it belongs to "treaty law". This is enough to fulfil the second *Tadić* condition as articulated by the Appeals Chamber. [...]

(iv) Fourth Tadić Condition

1. The Majority now comes to examine the fourth *Tadić* condition, namely whether a serious violation of the prohibition against terrorizing the civilian population entails, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. The issue here, in particular, is whether the intent to spread terror had already been criminalized by 1992. The Majority reiterates that it takes no position on whether a customary basis exists for a crime of terror as a violation of the laws or customs of war. Its discussion below amounts to a survey of statutory and conventional law relevant to the fulfilment of the fourth *Tadić* condition.
2. To the Majority's knowledge, the first conviction for terror against a civilian population was delivered in July 1947 by a court-martial sitting in Makassar in the Netherlands East-Indies (N.E.I.). [...]
3. The list of war crimes in the aforementioned N.E.I. statute reproduced with minor changes a list of war crimes proposed in March 1919 by the so-called Commission on Responsibilities, a body created by the Preliminary Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies during the 1914-1918 war. [...] The Commission's list of war crimes had "Murders and massacres; systematic terrorism" of civilians as one item (the first in the list). [...]
4. Australia's War Crimes Act of 1945 made reference to the work of the Commission on Responsibilities and included "systematic terrorism" in its category of war crimes.
5. The next relevant appearance of a prohibition against terror was in Article 33 of the 1949 Geneva Convention IV [...]. Purely by operation of Article 33, civilians in territory not occupied by the adversary are not protected against "measures of intimidation or of terrorism" which the adversary might decide to direct against them.
6. The most important subsequent development on the international stage was the unopposed emergence of Article 51(2) of Additional Protocol I (and of the identical provision in the second Protocol) [...]. [...]
7. The Majority now turns to consider a legislative development in the region relevant to this Indictment. [...]
8. The 22 May 1992 Agreement states in its section on "Implementation" that each party "undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force." Clearly the parties intended that serious violations of international humanitarian law would be prosecuted as criminal offences committed by individuals.
9. The developments reviewed so far demonstrate that, by the time the second part of 51(2) was added verbatim to the 22 May Agreement it already had a significant history of usage by direct or indirect reference in the region of the former Yugoslavia. [...]
10. The same conclusion is reached by another line of reasoning. [...] The Majority finds in Article 85's [of Protocol I] universal acceptance in the Diplomatic Conference clear proof that certain violations of Article 51(2) of Additional Protocol I had been criminalized. [...]
11. Because the alleged violations would have been subject to penal sanction in 1992, both internationally and in the region of the former Yugoslavia including Bosnia-Herzegovina, the fourth *Tadić* condition is satisfied.
12. [...] The Majority expresses no view as to whether the Tribunal also has jurisdiction over other forms of violation of the rule, such as the form consisting only of threats of violence, or the form comprising acts of violence not causing death or injury. [...]

13. In conclusion, the crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:
    1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
    2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
    3. The above offence was committed with the primary purpose of spreading terror among the civilian population.
14. The Majority rejects the Parties' submissions that actual infliction of terror is an element of the crime of terror. [...]
15. With respect to the "acts of violence", these do not include legitimate attacks against combatants but only unlawful attacks against civilians.
16. "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.
17. [...] The Majority accepts the Prosecution's rendering of "terror" as "extreme fear". The *travaux préparatoires* of the Diplomatic Conference do not suggest a different meaning. [...]

C. Cumulative Charging and Convictions [...]

2. Cumulative Convictions [...]

1. According to the Appeals Chamber it is permissible to enter cumulative convictions under different statutory provisions to punish the same criminal acts if "each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not contained in the other." [270] If it is not the case that each statutory provision involved has a materially distinct element, a conviction should be entered only under the more specific provision, namely the one with the additional element. [271] [...]
2. Applying the aforementioned test, convictions for the crimes of terror and attack on civilians under Article 3 of the Statute based on the same conduct are not permissible. The legal elements are the same except that the crime of terror contains the distinct material element of "primary purpose of spreading terror." This makes it more specific than the crime of attack on civilians. Therefore, if all relevant elements were proved, a conviction should be entered for Count 1 only.

[…]

D. Theories of Responsibility under Article 7 of the Statute

1. The Indictment alleges that General Galić, as commander of the SRK (Sarajevo Romanija Corps), and pursuant to Article 7(1) of the Statute, bears individual criminal responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of the campaign of shelling and sniping against the civilian population of Sarajevo. The Accused is also

alleged to bear individual criminal responsibility pursuant to Article 7(3) of the Statute for the conduct of his subordinates. [...]

1. Individual Responsibility under Article 7(1) of the Statute [...]

1. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute. Considering them in the order in which they appear in the Statute, “planning” has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases, and the crime was actually committed within the framework of that design by others. “Instigating” means prompting another to commit an offence, which is actually committed. It is sufficient to demonstrate that the instigation was “a clear contributing factor to the conduct of other person(s)”. It is not necessary to demonstrate that the crime would not have occurred without the accused’s involvement. “Ordering” means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to be given in any particular form. “Committing” means that an “accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal’s Statute”. Thus, it “covers first and foremost the physical perpetration of a crime by the offender himself.” “Aiding and abetting” means rendering a substantial contribution to the commission of a crime. These forms of participation in a crime may be performed through positive acts or through culpable omission. It has been held in relation to “instigating” that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates. The Defence contests the applicability of that case-law and considers that “in all the cases (under Article 7(1)) a person must undertake an action that would contribute to the commission of a crime”.
2. In the Majority’s opinion, a superior may be found responsible under Article 7(1) where the superior’s conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior’s disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior’s liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior’s conduct. In such cases the subordinate will most likely be aware of the superior’s support or encouragement, although that is not strictly necessary. [...]

2. Article 7(3) of the Statute

1. The case-law of the International Tribunal establishes that the following three conditions must be met before a person can be held responsible for the criminal acts of another under Article 7(3) of the Statute: (1) a superior-subordinate relationship existed between the former and the latter; (2) the superior knew

or had reason to know that the crime was about to be committed or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator. The Appeals Chamber has said that control must be effective for there to be a relevant relationship of superior to subordinate. Control is established if the commander had "the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." The Appeals Chamber emphasised that "in general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a Court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced."

2. In the absence of direct evidence of the superior's actual knowledge of the offences committed by his or her subordinates, this knowledge may established through circumstantial evidence. [...] The Trial Chamber also takes into consideration the fact that the evidence required to prove such knowledge for a commander operating within a highly disciplined and formalized chain of command with established reporting and monitoring systems is not as high as for those persons exercising more informal types of authority.
3. In relation to the superior's "having reason to know" that subordinates were about to commit or had committed offences, "a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had 'reason to know'." [...] [P]ast behaviour of subordinates or a history of abuses might suggest the need to inquire further. [...]
4. Finally, in cases where concurrent application of Articles 7(1) and 7(3) is possible because the requirements of the latter form of responsibility are satisfied alongside those of the former, the Trial Chamber has the discretion to choose the head of responsibility most appropriate to describe the criminal responsibility of the accused.

Footnotes

- 270: Celebici Appeal Judgement, para. 412 ↑
- 271: Celebici Appeal Judgement, para. 413 ↑

Paras 208 to 597

III. FACTUAL AND LEGAL FINDINGS [...]

C. Was there a Campaign of Sniping and Shelling by SRK Forces against Civilians? [...]

1. The Majority wishes to clarify at this point its reasoning in moving from the level of specific scheduled incidents to the level of a general campaign. It would be implausible to claim that 24 sniping attacks and 5 shelling attacks amounted to a "campaign" […]. The Majority makes no such claim. Spread out over a period of two years, the total of proved attacks, if any, could not in itself represent a convincing "widespread" or "systematic" manifestation of sniping and shelling of civilians. Therefore, the evidence which demonstrates whether the alleged scheduled incidents, if proved attacks, were not isolated incidents but representative of a campaign of sniping and shelling as alleged by the Prosecution is examined with no less due attention. [...]

1. General Evidence of Sniping and Shelling at Civilians in ABiH-held Areas of Sarajevo during the Indictment Period

1. The city of Sarajevo came under extensive gunfire and was heavily shelled during the Indictment Period. This is documented by UN reports, and other UN sources, which offer general assessments of the death or injury of Sarajevo civilians in the course of such attacks. [...]
2. The Defence submits however that the evidence suggests that the ABiH (Muslim Army of Bosnia-Herzegovina) carried out attacks againt their own civilians to attract sympathy of the international community. The Prosecution accepts that the Trial Record discloses that elements sympathetic or belonging to the ABiH may have attacked the Muslim population of Sarajevo although it argues that this evidence was inconclusive. [...] [A] Canadian officer with the UNPROFOR (United Nations Protection Force) testified that it was "'common knowledge' that [investigations carried out by the United Nations] strongly pointed to the fact that the Muslim forces did, on occasion, shell their own civilians" though, "for political reasons," that information was not made public. [...] According to Michael Rose, the British general who commanded UNPROFOR forces in Bosnia-Herzegovina from January 1994 to January 1995, what "was certain is that the Bosnian governement forces would, from time to time, fire at the Serbs, at particular moments of political importance, in order to draw back fire on to Sarajevo so that the Bosnian government could demonstrate the continuing plight of the people in Sarajevo".
3. On other occasions, UN sources also attributed civilian injuries and deaths to SRK actions, including deliberate targeting. According to General Francis Briquemont, who commanded UN forces in Bosnia-Herzegovina from 12 July 1993 to 24 January 1994, "There is no doubt that during the shelling" of Sarajevo by the SRK, "civilians were hit." [...]
4. John Ashton, who arrived in Sarajevo in July 1992 as a photographer, remembered that during his stay in Sarajevo, "The majority of things – the targets I saw were civilian targets. I saw a lot of people go out to water lines. These were targeted specifically. And I saw people try to cut down trees. I saw snipers actually shoot at people." Morten Hvaal, a Norwegian journalist covering the conflict from September 1992 to August 1994, witnessed civilians being shot at "more or less every day, if not every day" and estimated that he saw, or arrived within 30 minutes of, "50 to a hundred" instances where civilians were actually hit by small-arms fire. [...]
5. Ashton testified about fire-fighters targeted when tending fires started by shelling. [...]
6. Ambulances were also targeted. They were sometimes driven at night, without flashing their lights, and not on main roads to avoid being fired upon. Witness AD, an SRK soldier, testified that the Commander of the Ilijas Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo.
7. Hvaal testified that during the Indictment Period he attended funerals several times a week and saw that the Bosnian Serb army would shell them. [...]
8. According to UN military personnel, trams were also deliberately targeted by Bosnian Serb forces. [...]
9. Civilians in ABiH-held areas of Sarajevo deferred even basic survival tasks to times of reduced visibility, such as foggy weather or night time, because they were targeted otherwise. [...]

2. Sniping and Shelling of Civilians in Urban ABiH-held Areas of Sarajevo

(a) General Grbavica Area [...]

(i) Scheduled Sniping Incident 5

1. Milada Halili and her husband Sabri Halili testified that on the morning of 27 June 1993, at around noon, they were walking with Almasa Konjhodzic, Milada's mother, to the PTT building. [...] Milada Halili, who was a bit ahead, ran across the intersection behind a barrier of containers which had been set up to protect against shooting from Grbavica. Frightened by the shot, Almasa Konjhodzic lost her balance and fell. Sabri Halili helped her to her feet and they continued. They had walked ten metres when Almasa Konjhodzic was struck by a bullet. Sabri Halili turned to see a pool of blood beneath his mother-in-law. The victim was taken to hospital where she died from the wound.
2. The Trial Chamber accepts the description of the incident as recounted by the witnesses and is satisfied that the victim was a civilian. The victim were [*sic*] wearing civilian clothes. Although Sabri Halili was a member of the ABiH, he was off-duty that day and was not dressed in uniform or carrying weapons. [...]
3. The Majority therefore finds that Almasa Konjhodzic, a civilian, was deliberately targeted and killed by a shot fired from SRK-controlled territory in Grbavica. [...]

(ii) Scheduled Sniping Incident 6

1. Sadiha Sahinovic testified that on 11 July 1993, at about 2 or 3pm, she went with her friend Munira Zametica to fetch water at the Dobrinja river. Sniping had gone on throughout the day. Sahinovic explained that she and Zametica found shelter with a group of 6, 7 persons in an area under the bridge where the river ran. They did not dare to approach the riverbank until Zametica overcame her hesitation and approached the riverbank. She was filling her bucket with water when she was shot. It was too dangerous for Sahinovic and for Vahida Zametica, the
16-year-old daughter of the victim who came to assist once alerted of the incident, to leave the protection of the bridge. The victim was lying face down in the river, blood coming out of her mouth. Vahida heard the shooting continue and saw the bullets hitting the water near her mother. ABiH soldiers passing by the bridge saw what had happened, positioned themselves on the bridge behind sandbags and shot into the direction of the Orthodox Church. The victim was pulled out of the water and taken to hospital; she died later that afternoon.
2. The Defence claims that the victim could not have been hit from "VRS" positions because the Dobrinja River or the victim could not be seen from there; the Defence argues that ABiH soldiers had fortified positions on the bridge, that combat was ongoing at the time the incident occurred and that the victim was hit by a stray bullet.
3. Sahinovic testified that the bullets directed at the victim originated from the Orthodox Church in Dobrinja. She, like the victim's daughter, indicated that shooting at the river always originated from the Orthodox Church. This is both consistent with the side of the bridge at which those who had come to fetch water had taken shelter as with the observations in respect of continuing fire which prevented those present from removing the victim from the riverbank. SRK firing positions on the tower of the Orthodox Church and nearby high-rise buildings were confirmed by several witnesses. [...]
4. The Trial Chamber also rejects the defence's claim that ABiH soldiers at that time held fortified positions on the bridge and that the victim was hit by a stray bullet fired during combat. Reliable testimony establishes that ABiH soldiers passed by after the event and only then opened return fire in the direction of the Orthodox Church. In the present case, the activity the victim was engaged in, the fact that civilians

routinely fetched water at this location and her civilian clothing were indicia of the civilian status of the victim. At a disctance of 1100 metres (as determined by Hinchcliffe), the perpetrator would have been able to observe the civilian appearance of Zametica, a 48-year-old civilian woman, if he was well equipped, or if no optical sight or binoculars had been available, the circumstances were such that disregarding the possibility that the victim was civilian was reckless. Furthermore, the perpetrator repeateadly shot toward the victim preventing rescuers from approaching her. The Trial Chamber concludes that the perpetrator deliberately attacked the victim. The mere fact that at the distance of 1100 metres the chance of hitting a target deteriorates does not change this conclusion. The suggestion by the Defence that the cause of death should be doubted in the absence of specific forensic medical information is also rejected. The course of events sufficiently proves that Zametica's death was a consequence of direct fire opened on her.

5. The Trial Chamber finds that Munira Zametica, a civilian, was deliberately shot from SRK-held territory. [...]

(vi) Scheduled Shelling Incident 1

1. On 1 June 1993, some residents of Dobrinja decided to organize a football tournament in the community of Dobrinja IIIB. It was a beautiful, sunny day. Being aware of the danger of organising such an event, the residents looked for a safe place to hold the tournament. The football pitch was set up in the corner of a parking lot, which was bounded by six-storey apartment blocks on three sides and on the fourth side, which faced the north, by Mojmilo hill, and was not visible from any point on the SRK side of the confrontation line. Around 200 spectators, among whom were women and children, gathered to watch the teams play. [...]
2. The first match of the tournament began at around 9 am and the second one started an hour later. Some minutes after 10 am, during the second match, two shells exploded at the parking lot. Ismet Fazlic, a member of the civil defence, was the referee of the second game. [...]
3. [...] The Majority [...] finds that there is sufficient specific and credible evidence to conclude that it has been shown beyond reasonable doubt that the explosion of 1 June 1993 in Dobrinja killed over 10 persons and injured approximately 100 others.
4. The Defence submits that the shells were not deliberately fired by SRK forces upon civilians. [...]
5. [...] Had the SRK forces launched two shells into a residential neighbour-hood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area. The Majority notes that there is no evidence on the Trial Record that suggests that the SRK was informed of the event taking place in the parking lot. However, had the SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated. In light of its finding regarding the source and direction of fire, and taking account of the evidence that the neighbourhood of Dobrinja, including the area of the parking lot, was frequently shelled from SRK positions, the Majority finds that the first scheduled shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area. [...]

g) Stari Grad Area

[...]

(ii) Scheduled Shelling 5

a. Description of the Incident

1. Witnesses testified that on 5 February 1994, around noon, many people were shopping in the Markale open-air market, when a single explosion shook the area. [...] Residents and by-passers in the area [...] testified about hearing a loud explosion, which injured and killed a number of people present at the market. People present in the market transported victims of the blast to local hospitals, and the evacuation of the victims was completed by 12:40 hours.
2. Edin Suljic, on behalf of a local investigative team set up to investigate the incident, and Afzaal Niaz, on behalf of the UN, visited the hospitals and the morgue where the victims of the blast were taken. They each counted over 60 persons killed and over 140 persons injured. [...]

h. Conclusion on Deliberateness of the Attack

1. Evidence in the Trial Record establishes that a target, such as Markale market, can be hit from a great distance with one shot if the area is pre-recorded. Niaz testified that in the four months preceding the incident at 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. The UNMOs who wanted to investigate these attacks were not allowed access to the northeast area of the city controlled by the SRK. After the Markale incident, Hamill visited an SRK representative positioned in the northeastern area of the city, Colonel Cvetkovic, who confirmed to him that there were a number of 120 mm mortars in Mrkovici and along the estimated direction of fire to the north-northeast of Markale.
2. The Majority is convinced that the mortar shell which struck Markale was fired deliberately at the market. That market drew large numbers of people. There was no reason to consider the market area as a military objective. Evidence was presented in relation to the status of the “December 22” building located by the market, which manufactured uniforms for the police and the army. It is unclear whether manufacturing was still on-going at the time of the incident but in any case it is not reasonable to consider that the employees of such a manufacturing plant would be considered legitimate targets.
3. In sum, the Majority finds beyond reasonable doubt that the 120 mm mortar shell fired at Markale market on 5 February 1994, which killed over 60 persons and wounded over 140 others, was deliberately fired from SRK-controlled territory. [...]

4. Pattern of Fire into ABiH-held Areas of Sarajevo

1. A general pattern of fire was noticed in Sarajevo during the Indictment Period. The evidence is that the shelling of the city was fierce in 1992 and 1993. Mole, Senior UNMO from September to December 1992, testified that throughout the three months he spent in Sarajevo, there was not a single day where there were no shell impacts in the city. There was continual background noise of small arms and

mortars and artillery. [...] Tucker, a British officer who served as assistant to general Morillon from October 1992 to March 1993, added that “there was daily random shelling of various parts of the city. There was constant sniper fire and there were intense periods of small arms and artillery fire around the perimeter from time to time as attacks by one side or the other continued. It was a horrible situation”. [...]

5. Were Sniping and Shelling Attacks on Civilians in ABiH-held Areas of Sarajevo Committed with the Aim to Spread Terror?

1. The Prosecution alleges that the underlying reason for the “campaign” of sniping and shelling was that of terrorizing the civilian population of Sarajevo. [...]
2. Tucker explained that indeed “from about December 1992 onwards, the Bosnian Serb side wanted peace. They wanted an overall cease-fire in order to consolidate the territory of which they had taken control of.” The Bosnians, on the other hand, could not accept a cease-fire which “meant accepting the status quo.” Rose also said that it was true that “the forces commanded by General Galić wished not to have war, on the contrary, to have global cease-fire.” He added though, that the Bosnian Serb Army “was in the military ascendancy and that it was in their interest to halt the fighting at the moment, politically.” Rose added that the international community had some difficulties in accepting peace-plans: “There was certainly a desire amongst the international community not to reward the aggressor.” In re-examination, the witness repeated that “the Serbs could never be described as peace mongers. They were the aggressors. They had taken much of Sarajevo as well as Bosnia”.
3. That evidence is supported by other evidence in the Trial Record from a considerable number of UN military personnel that, as early as autumn 1992, sniping and shelling fire onto the city of Sarajevo from SRK-held territories was not justified by military necessity, but rather was aimed at terrorizing the civilian population in ABiH-held areas of Sarajevo. [...]
4. Witness Y, a member of the UNPROFOR posted in Sarajevo in the first part of 1993, explained that in his opinion “the objective they [SRK forces] pursued was to make every inhabitant in Sarajevo feel that nobody was sheltered or protected from [...] the shooting and that the shooting was not aimed at military objectives but rather to increase the helplessness of the population [...] and was aimed at cracking them and to make them collapse, nervously speaking[.]”He reiterated the same comment with regard to sniping: “The idea was to exercise psychological pressure, and there we realised that the objectives were very specifically civilian ones.” [...]
5. General Van Baal, UNPROFOR Chief of Staff in Bosnia-Herzegovina in 1994, testified that sniping in Sarajevo was “without any discrimination, indiscriminately shooting defenceless citizens, women, children, who were unable to protect and defend themselves, at unexpected places and at unexpected times” and that this led him to conclude that its objective was to cause terror; he specified that women and children were the predominant target. A similar assessment was provided by Francis Briquemont, Commander of UN forces in BiH from July 1993 to January 1994, for whom “the objectives [of the campaign] were basically civilians in order to put pressure on the population”. He added that in a number of cases, either experienced by himself personally or by others, the SRK conduced what he called “quasi-sniping or playing at snipers,” a tactic of hitting a target with the aim of actually not neutralising it; this terrorised the population. [...]

6. Number of Civilians Killed or Injured in ABiH-controlled Parts of Sarajevo during the Indictment Period [...]

1. According to the Tabeau Report, the minimum number of persons killed within the confrontation line in Sarajevo during the Indictment Period was 3,798, of whom 1,399 were civilians. The minimum number of wounded for the same period was 12,919, including 5,093 civilians. [...]
2. The Trial Chamber considers that the main conclusions of the Tabeau Report are supported by other evidence in the Trial Record. [...]

7. Conclusion on whether there was a Campaign of Sniping and Shelling in Sarajevo by SRK Forces [...]

1. The Trial Chamber stated earlier that it understood the term "campaign" in the context of the Indictment to cover military actions in the area of Sarajevo involving widespread or systematic shelling and sniping of civilians resulting in civilian death or injury. The Majority believes that such a campaign existed for the reasons given below. [...]
2. In view of the evidence in the Trial Record it has accepted and weighed, the Majority finds that the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition. The attacks on civilians had no discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo. [...]

D. Legal Findings

1. Offences under Article 3 of the Statute

1. In the present instance, it is not disputed that a state of armed conflict existed between Bosnia-Herzegovina and its armed forces on the one hand, and the Republika Sprska and its armed forces, on the other. There is no doubt, from a reading of the factual part of this Judgement, that all the criminal acts described therein occurred not only within the framework of, but in close relation to, that conflict.
2. The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.
3. The Majority is also satisfied that crime of terror within the meaning of Article 3 of the Statute was committed against the civilian population of Sarejevo during the Indictment Period. In relation to the *actus reus* of the crime of terror as examined above, the Trial Chamber has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period. The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of ABiH-held areas of Sarajevo with the primary purpose of spreading terror.

[…]

Paras 609 to 769

IV. CRIMINAL RESPONSIBILITY OF GENERAL GALIĆ

A. Introduction [...]

3. The Role of General Galić

1. There is no dispute between the parties that General Galić, as Corps commander, was in charge of continuing the planning and execution of the military encirclement of Sarajevo. At the time of General Galić's appointment as commander of the SRK, the military encirclement of Sarajevo was achieved. [...]
2. [...] The Prosecution submits in particular that after the Accused assumed command of the SRK in September 1992, there was no perceptible change in the campaign of sniping and shelling. According to the Prosecution, the Accused thus became the implementor of a pre-existing strategy and participated in both the legitimate military campaign against the ABiH and the unlawful attacks directed against the civilian population in Sarajevo. [...]
3. The Indictment alleges that General Galić is criminally responsible for his participation in the crimes pursuant to Article 7(1) of the Statute. [...] [T]he Prosecution [...] alleges that evidence concerning General Galić's knowledge of crimes committed in Sarajevo by forces under his command, the high degree of discipline he enjoyed from his subordinates and his failure to act upon knowledge of commission of crimes "establishes beyond reasonable doubt that the targeting of civilians was ordered by him". [...]

B. Was General Galić in Effective Command of the SRK Forces throughout the Relevant Period? [...]

2. Conclusions about the Effectiveness of the Command and Control of the Chain of Command

1. The Trial Chamber has no doubt that General Galić was an efficient and professional military officer. Upon his appointment, he finalised the composition and organisation of the SRK. General Galić gave the impression to his staff and to international personnel that he was in control of the situation in Sarajevo.
2. General Galić was present on the battlefield of Sarajevo throughout the Indictment Period, in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galić was perfectly cognisant of the situation in the battlefield of Sarajevo. The Trial Record demonstrates that the SRK reporting and monitoring systems were functioning normally. General Galić was in a good position to instruct and order his troops, in particular during the Corps briefings. Many witnesses called by the Defence gave evidence in relation to the fact that the orders went down the chain of command normally. They recalled in particular that orders were usually given in an oral form, the communication system of the SRK being good.
3. There is a plethora of evidence from many international military personnel that the SRK personnel was competent, and under that degree of control by the chain of command which typifies well-regulated armies. That personnel concluded that both sniping and shelling activity by the SRK was under strict control by the chain of command from observation of co-ordinated military attacks launched in the city of Sarajevo in a timely manner, of the speedy implementation of cease-fire agreements, of threats of attacks followed by effect, or of the type of weaponry used. The Trial Chamber is convinced that the SRK personnel was under normal military command and control.

4. On the basis of the Trial Record, the Trial Chamber is also satisfied beyond reasonable doubt that General Galić, as a Corps commander, had the material ability to prosecute and punish those who would go against his orders or had violated military discipline, or who had committed criminal acts.
5. The Trial Chamber finds that the Accused General Galić, commander of the Sarajevo Romanija Corps, had effective control, in his zone of responsibility, of the SRK troops. [...]

C. Did General Galić Know of the Crimes Proved at Trial? [...]

7. Conclusions about General Galić's Knowledge of Criminal Activity of the SRK

1. Although it has found that the reporting and monitoring system of the SRK was good, the Trial Chamber cannot discount the possibility that General Galić was not aware of each and every crime that had been committed by the forces under his command. [...]
2. The Trial Chamber recalls however that the level of evidence to prove such knowledge is not as high for commanders operating within a highly disciplined and formalised chain of command as for those persons exercising more informal types of authorities, without organised structure with established reporting and monitoring systems. The Trial Chamber has found that the SRK's chain of command functioned properly. [...]
3. [...] First, there is a plethora of credible and reliable evidence that General Galić was informed personally that SRK forces were involved in criminal activity. The Accused's responses to formal complaints delivered to him form the backdrop of his knowledge that his subordinates were committing crimes, some of which are specifically alleged in the Indictment. Not only General Galić was informed personally about both unlawful sniping and unlawful shelling activity attributed to SRK forces against civilians in Sarajevo, but his subordinates were conversant with such activity. The Trial Chamber has no doubt that the Accused was subsequently informed by his subordinates. [...]
4. The Trial Chamber finds that General Galić, beyond reasonable doubt, was fully appraised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings. [...]

D. Did General Galić Take Reasonable Measures upon his Knowledge of Crime? [...]

2. Conclusions

1. General Galić may have issued orders to abstain not to attack civilians [sic]. The Trial Chamber is concerned that, as examined in Part III of this Judgement, civilians in Sarajevo were nevertheless attacked from SRK-controlled territories. Although SRK officers were made aware of the situation on the field, acts of violence against civilians in Sarajevo continued over an extended period of time.
2. There is also some evidence that General Galić conveyed instructions to the effect of the respect of the 1949 Geneva Conventions. The testimonies of DP35 and DP14, both SRK officers, reveal however the extent of the lack of proper knowledge in relation to the protection of civilians. In particular, the statement from DP35, an SRK battalion commander, that a civilian must necessarily be 300 metres away from the confrontation line in order not to be shot at gives rise to concern. In an urban battlefield, it is almost impossible to guarantee that civilians will remain at least 300 meters away from a frontline. Witness DP34 also testified that information about formal protests against unlawful sniping or shelling was never relayed to him. [...]
3. In view of the above, the Trial Chamber finds that the Accused did not take reasonable measures to prosecute and punish perpetrators of crimes against civilians. [...]

F. Conclusion: Does General Galić Incur Criminal Responsibility under Article 7(1) of the Statute?

1. This conclusion expresses the view of a majority of the Trial Chamber. Judge Nieto Navia dissents and expresses his view in the appended separate and dissenting opinion to this Judgement. [...]

2. Did General Galić Order the Commission of Crimes Proved at Trial? [...]

1. In sum, 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 crime and punish the perpetrators thereof upon that knowledge, furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo. The Majority finds that General Galić is guilty of having ordered the crimes proved at trial. [...]

VI. DISPOSITION

1. FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, and having excluded from consideration those incidents which the Prosecution has failed to prove exemplary of the crimes charged in the Indictment, the Trial Chamber, Judge Nieto-Navia dissenting, makes the following disposition in accordance with the Statute and Rules:

Stanislav Galić is found GUILTY on the following counts, pursuant to Article 7(1) of the Statute of the Tribunal:

COUNT 1: Violations of the Laws or Customs of War (acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

[…]

The finding of guilt on count 1 has the consequence that the following counts are DISMISSED:

COUNT 4: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

COUNT 7: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

The Trial Chamber, by Majority, hereby SENTENCES Stanislav Galić to a single sentence of 20 (twenty)

years of imprisonment. [...]

Done on the Fifth Day of December 2003 in English and French, the English text being authoritative.

At The Hague, The Netherlands

Judge Amin El Mahdi;

Judge Alphonse Orie Presiding;

Judge Rafael Nieto-Navia.

Separate opinion of Judge Nieto-Navia - Paras 2 to 120

VII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE NIETO-NAVIA [...]

A. Introduction [...]

1. 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 [...]

2. Available weapons

1. 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 (Yugoslav Peoples' Army) departed from the city. 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. 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. Furthermore, SRK soldiers appearing before the Trial Chamber explained that they were not aware of sniper units operating within the SRK and no evidence was tendered indicating that such weapons had been used in specific incidents during the Indictment Period. [...]

3. The role of UNMOs

1. The UN was present in Sarajevo during the conflict through UNPROFOR and UNMO (United Nations Military Observers) 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. It was difficult for the UNMOs to accomplish their task effectively since they were understaffed. Their mission was further complicated by the use made by the ABiH of mobile mortars. As a result, discrepancies between UNMO reports about observed military exchanges were relatively frequent. [...]

5. Living conditions within the city

1. 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. Secure corridors, otherwise known as “blue roads,” were established to allow humanitarian convoys and civilians to enter the city. Inspectors were posted along these roads to check that humanitarian convoys were not used to smuggle military equipment. 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.
2. 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 medicine. 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. It appears though that in areas under the effective control of the BiH Presidency, utilities were repaired promptly. 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. 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.

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

(a) Sizeable ABiH presence inside the city

1. 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, representing a sizeable minority of Sarajevo’s estimated 340,000 inhabitants. 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. As a UN representative explained, waging war under these circumstances is “a soldier’s worst nightmare.” 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.”
2. 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. Furthermore, attacks were launched against the SRK from mobile mortars positioned in civilian areas of Sarajevo and the ABiH

sheltered military resources in civilian areas, including in civilian buildings and in the immediate vicinity of the Kosevo hospital in Sarajevo. It also made use of available vehicles in the city, including those belonging to civilians, to transport military assets without systematically identifying these trucks and cars as belonging to the military.

(b) Attacks launched against the SRK from protected facilities

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

7. Attacks on civilian targets

1. 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. The evidence from UN representatives posted in Sarajevo also strongly suggests that the ABiH at times attacked civilians in parts of the city under its control.

8. Role of the media

1. 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. 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. 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,” adding that reports from UN observers contributed to this negative image. 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. Other senior UN observers echoed this sentiment, explaining that they felt that the media regarded the ABiH as the beleaguered party. This media spotlight governed to a certain extent the SRK’s conduct during the conflict.

C. Scheduled and unscheduled incidents [...]

1. 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, which are weapons which can be transported with relative ease. 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.” [...]

D. Conduct of a campaign

1. 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. 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.
2. 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. 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 injured and a minimum 1,399 civilians had been killed due to shelling and shooting, 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. 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. 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.
3. An army characterized by the level of competence and professionalism ascribed to the SRK by the Prosecution 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. 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.
4. 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, entered into anti-sniping agreements and agreed to the establishment of the TEZ (Total Exclusion Zone Agreement). 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. [See Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] According to one 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” 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

1. 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 willfully 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." I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal.
2. 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." 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."
3. 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." With respect to ratione personae or personal jurisdiction, the Appeals Chamber found that the Secretary-General's Report did not contain any express 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."
4. 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.
5. 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." 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. Instead, it argues that such individual criminal responsibility attaches by operation of conventional law. 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, 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."

6. 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. 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. 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 [...]

3. Article 7

(a) Article 7(1)

1. 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. 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. [...] Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces. 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. [...]
2. 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 another to commit an

offence." 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)." 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.

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.

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)

1. 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 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. I am satisfied that the Trial Record establishes that all three conditions have been met 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. [...]

Rafael Nieto-Navia Judge

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

B. Appeals Chamber, Judgement - Paras 69 to 109

[**Source**: ICTY, Prosecutor v. Stanislav Galic, Judgement, Appeals Chamber, 30 November 2006, IT-98-29-A; available at www.icty.org. Footnotes omitted.]

IN THE APPEALS CHAMBER

PROSECUTOR

v.

STANISLAV GALIC

JUDGEMENT

[…]

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

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

[…]

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

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

[…]

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

1. Pursuant to Article 1 of the Statute, the International Tribunal has jurisdiction over "serious violations of international humanitarian law". What is encompassed by "international humanitarian law" is however not specified in the Statute. […]
2. When first seized of the issue of the scope of its jurisdiction *ratione materiae*, the International Tribunal interpreted its mandate as applying not only to breaches of international humanitarian law based on customary international law but also to those based on international instruments entered into by the conflicting parties – including agreements concluded by conflicting parties under the auspices of the ICRC to bring into force rules pertaining to armed conflicts – provided that the instrument in question is:
    i. [...] unquestionably binding on the parties at the time of the alleged offence; and (ii) [...] not in conflict with or derogat[ing] from peremptory norms of international law, as are most customary rules of international humanitarian law.
3. However, while conventional law can form the basis for the International Tribunal's jurisdiction, provided that the above conditions are met, an analysis of the jurisprudence of the International Tribunal demonstrates that the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements. […]
4. The Appeals Chamber rejects Galić's argument that the International Tribunal's jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law. However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.

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

[…]

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

1. In the present case, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute, on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which state:

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

[…] The purposes of Additional Protocols I and II […] were to "reaffirm and develop the provisions protecting

the victims of armed conflicts" and "to ensure a better protection for the victims" of armed conflicts. Additional Protocol II, further, is considered to embody the "fundamental principles on protection for the civilian population". Articles 51(2) of Additional Protocol I and 13(2) of Additional Protocol II, in essence, contribute to the purpose of those treaties. They do not contain new principles but rather codify in a unified manner the prohibition of attacks on the civilian population. The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law. These principles incontrovertibly form the basic foundation of international humanitarian law and constitute "intransgressible principles of international customary law". As the Appeals Chamber has held in previous decisions, the conventional prohibition on attack on civilians contained in Articles 51 of Additional Protocol I and 13 of Additional Protocol II constitutes customary international law. In so holding, the Appeals Chamber has made no distinction within those articles as to the customary nature of each of their respective paragraphs. In light of the above, and considering that none of the States involved in the Diplomatic Conference leading to the adoption of both Protocols expressed any concern as to the first three paragraphs of Article 51 of Additional Protocol I, and as Article 13 of Additional Protocol II was adopted by consensus, the Appeals Chamber considers that, at a minimum, Article 51(1), (2) and (3) of Additional Protocol I and Article 13 of Additional Protocol II in its entirety constituted an affirmation of existing customary international law at the time of their adoption. The Appeals Chamber therefore affirms the finding of the Trial Chamber that the prohibition of terror, as contained in the second sentences of both Article 51 (2) of Additional Protocol I and Article 13(2) of Additional Protocol II, amounts to "a specific prohibition within the general (customary) prohibition of attack on civilians".

1. The Appeals Chamber found further evidence that the prohibition of terror among the civilian population was part of customary international law from at least its inclusion in the second sentences of both Article 51 (2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The 1923 Hague Rules on Warfare prohibited "[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants". Similarly, the 1938 Draft Convention for the Protection of Civilian Populations against New Engines of War expressly prohibited "[a]erial bombardment for the purpose of terrorising the civilian population". Even more importantly, Article 33 of Geneva Convention IV, an expression of customary international law, prohibits in clear terms "measures of intimidation or of terrorism" as a form of collective punishment, as they are "opposed to all principles based on humanity and justice". Further, Article 6 of the 1956 New Delhi Draft Rules for protection of civilians states that "[a]ttacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited." More recently, Article 6 of the 1990 Turku Declaration of Minimum Humanitarian Standards envisaged that "[a]cts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited".
2. Another indication of the customary international law nature of the prohibition of terror at the time of the events alleged in this case can be found in the number of States parties to Additional Protocols I and II by 1992. Also, references to official pronouncements of States and their military manuals further confirm the customary international nature of the prohibition. With respect to official pronouncements, the Appeals Chamber notes that the United States, a non-party to Additional Protocol I, expressed in 1987

through the deputy Legal Adviser to the US Department of State its support for the "principle that the civilian population as such, as well as individual citizens, not be the objects of acts or threats of violence the primary purpose of which is to spread terror amongst them". Similarly, in 1991, in response to an inquiry of the ICRC as to the application of international humanitarian law in the Gulf region, the US Department of the Army pointed out that its troops were acting in respect of the prohibition of acts or threats of violence the main purpose of which was to spread terror among the civilian population. With respect to military manuals, the Appeals Chamber notes that a large number of countries have incorporated provisions prohibiting terror as a method of warfare, some of them in language similar to the prohibition set out in the Additional Protocols, or even verbatim.

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

(b) The criminalisation of the prohibition of terror against the civilian population

1. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute. The conditions that must be fulfilled for a violation of international humanitarian law to be subject to Article 3 of the Statute are ("*Tadić* conditions"): [**See** Part A. of this Case, **or** ICTY, The Prosecutor v. Tadic [Part A., para. 94]]
2. Individual criminal responsibility under the fourth Tadić condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.
3. The first reference to terror against the civilian population as a war crime, as correctly noted by the Trial Chamber, is found in the 1919 Report of the Commission on Responsibilities, created by the Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies in World War 1. The Commission found evidence of the existence of "a system of terrorism carefully planned and carried out to the end", stated that the belligerents employed "systematic terrorism", and listed among the list of war crimes "systematic terrorism". Although the few trials organised on that basis in Leipzig did not elaborate on the concept of "systematic terrorism", this is nonetheless an indication that, in 1919, there was an intention to criminalise the deliberate infliction of terror upon the civilian population. Further, in 1945, Australia's War Crimes Act referred to the work of the 1919 Commission on Responsibilities and included "systematic terrorism" in its list of war crimes.
4. With respect to national legislation, the Appeals Chamber notes that numerous States criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction. The Norwegian Military Penal Code of 1902, as amended, provides that "[a]nyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [the four Geneva Conventions and the two Additional Protocols of 1977] is liable to imprisonment." The 1962 Geneva Conventions Act of Ireland, for example, provides that any "minor breach" of the Geneva Conventions, including violations of Article 33 of Geneva Convention IV, is a punishable offence".
5. The Appeals Chamber also notes that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols. The Criminal Codes of the Czech Republic and the

Slovak Republic, for example, criminalise “terroris[ing] defenceless civilians with violence or the threat of violence”. Further, numerous States have incorporated provisions that criminalise terrorisation of civilians in time of war. The Penal Code of Cote d’Ivoire, for example, provides that measures of terror in time of war or occupation amount to a “crime against the civilian population”. The Penal Code of Ethiopia punishes anyone who organises, orders or engages in “measures of intimidation or terror” against the civilian population in time of war, armed conflict or occupation. During the relevant period, the Netherlands included “systematic terrorism” in its list of war crimes that carried criminal penalties.

6. The Appeals Chamber also notes the references by the Trial Chamber to the laws in force in the former Yugoslavia at the time of the commission of the offences charged, particularly Article 125 (“War Crime Against the Civilian Population”) in Chapter XI (“Criminal Offences Against Humanity and International Law”) of the 1960 Criminal Code of the Republic of Yugoslavia and the superseding Article 142 (“War Crime Against the Civilian Population”) in Chapter XVI (“Criminal Offences Against Humanity and International Law”) of the 1976 Criminal Code, both of which criminalise terror against the civilian population, and provisions of Yugoslavia’s 1988 “[Armed Forces] Regulations on the Application of International Laws of War”, which incorporated the provisions of Additional Protocol I, following Yugoslavia’s ratification of that treaty on 11 March 1977. Those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime, but are also relevant to the assessment of the foreseeability and accessibility of that law to Galić.
7. In addition to national legislation, the Appeals Chamber notes the conviction in 1997 by the Split County Court in Croatia for acts that occurred between March 1991 and January 1993, under, inter alia, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, including “a plan of terrorising and mistreating the civilians”, “open[ing] fire from infantry arms [...] with only one goal to terrorise and expel the remaining civilians”, “open[ing] fire from howitzers, machine guns, automatic rifles, anti-aircraft missiles only to create the atmosphere of fear among the remaining farmers”, and “carrying out the orders of their commanders with the goal to terrorise and threaten with the demolishing of the Peruca dam”. [**See** Croatia, Prosecutor v. Rajko Radulović and Others]
8. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Schomburg dissenting, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment.

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

1. Galić argues under his fifth ground of appeal that although he stood trial under Count 1 for terror against the civilian population including as one of its elements the infliction of terror against the civilian population, he was convicted and sentenced for a different offence which did not require the infliction of terror against the civilian population, but merely the intent to spread terror among the civilian population. He argues that the Trial Chamber thereby impermissibly departed from the Indictment. […] Under the present ground of appeal, Galić again argues that it was not proven that “terror as such was inflicted upon the civilian population” […]. He argues […] that the Trial Chamber erred both specifically when it found that infliction of terror against the civilian population is not an element of the crime and generally in identifying the elements of the crime. […]
2. Having found that the prohibition on terror against the civilian population in the Additional Protocols was

declaratory of customary international law, the Appeals Chamber will base its analysis of the elements of the crime under consideration under Count 1 on the definition found therein: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”

(a) Actus reus

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

(b) Mens rea and result requirement

1. As the Trial Chamber correctly noted, a plain reading of Article 51(2) of Additional Protocol I does not support a conclusion that the acts or threats of violence must have actually spread terror among the civilian population. […] [T]he *travaux préparatoires* to Additional Protocol I clearly establish that there had been attempts among the delegations to replace the original wording from intent to spread terror among the civilian population to actual infliction of terror on the civilian population but that this proposed change was not accepted. […]
2. [T]he Appeals Chamber finds that actual terrorisation of the civilian populations is not an element of the crime. The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, the Appeals Chamber finds that a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.

[…]

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

Disposition and Separate opinion of Judge Schomburg

XVIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

[…]

DISMISSES Galić's appeal;

ALLOWS, by majority, Judge Pocar partially dissenting and Judge Meron dissenting, the Prosecution's appeal, **QUASHES** the sentence of twenty years' imprisonment imposed on Galić by the Trial Chamber and **IMPOSES** a sentence of life imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Galić has already spent in detention;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Galić is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

[…]

XXII. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

[…]

1. […] I cannot agree with the majority of the bench which affirmed Galić's conviction under Count 1 for the crime of "acts and threats of violence the primary purpose of which is to spread terror among the civilian population" ("terrorization against a civilian population"). In my view, there is no basis to find that this prohibited conduct as such was penalized beyond any doubt under customary international criminal law at the time relevant to the Indictment. Rather, I would have overturned Galić's conviction under Count 1 and convicted him under Counts 4 and 7 for the same underlying criminal conduct, taking into account the acts of terrorization against a civilian population as an aggravating factor in sentencing […].

C. The Applicability of the "Crime of Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population" to the Present Case

[…]

2. Article 3 of the Statute and "Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population"

1. It is generally accepted that the existence of customary law has primarily to be deducted from the practice and *opinio juris* of states. There can be no doubt – as explained in the Judgement – that the prohibition of acts and threats of violence the primary purpose of which is to spread terror among the civilian population, as set out in Article 51(2), 2nd Sentence of Additional Protocol I and Article 13(2), 2nd Sentence of Additional Protocol II, was part of customary international law. The violation of this prohibition by Galić clearly fulfilled the first three *Tadić* conditions. However, the core question of this case is whether the fourth *Tadić* condition was met as well, that is, whether the aforementioned prohibition was penalized, thus attaching individual criminal responsibility to Galić.
2. The Judgement comes to the conclusion that the fourth *Tadić* condition was satisfied, stating "that numerous states criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction" and "that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols". Upon further analysis, it is questionable whether these claims are accurate. Indeed, the temporal point of departure when determining whether there was state practice must be the time period relevant to the Indictment, which charged Galić for acts committed between 1992 and 1994.
3. **Ireland**, mentioned in paragraph 94 of the Judgement, only penalized violations of the Additional Protocols in 1998. The reference to Ireland's Geneva Convention Act of 1962 is thus misguided. […]
4. The Appeals Chamber was thus only able to establish with certainty that just an extraordinarily limited number of states at the time relevant to the Indictment had penalized terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols, these being **Côte D'Ivoire**, the then **Czechoslovakia**, **Ethiopia**, the **Netherlands**, **Norway** and **Switzerland**. It is doubtful whether this can be viewed as evidence of "extensive and virtually uniform" state practice on this matter. […]
5. In any event, it is not sufficient to simply refer to a "continuing trend of nations criminalising terror as a method of warfare" when this trend, if it can be identified as such, is of no relevance to the time period in which Galić's criminal conduct falls.

[…]

1. Finally, it must be considered that the Trial Chamber made no finding as to the nature of the conflict being international or non-international at that time. However, an additional finding would have been required by the Appeals Chamber even though the relevant provisions of Additional Protocol I (applying to international armed conflicts) and Additional Protocol II (applying to non-international armed conflicts) are identical. At least, pursuant to the view of the majority which is based primarily on an interpretation of the Additional Protocols, the Appeals Chamber should have made a much more detailed determination of why according to the opinion of the majority both the relevant provisions of Additional Protocol I and Additional Protocol II would amount to international customary law.

[…]

1. What then is supposed to be the foundation of state practice, apart from the few states mentioned above? Moreover, while noting that *de jure* all member States of the United Nations are on an equal footing, I nevertheless observe that none of the permanent members of the Security Council or any other prominent state have penalized terrorization against a civilian population.
2. With regard to *opinio juris*, it is undisputed, as mentioned above, that there were many statements by states concerning the prohibition of acts and threats of violence the primary purpose of which is to spread terror among the civilian population but not referring to its penalization. […]
3. In addition, and even though I am fully aware of Article 10 [stating "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."] of the Statute of the International Criminal Court, it must be pointed out that the Rome Statute does not have a provision referring to terrorization against a civilian population. If indeed this crime was beyond doubt part of customary international law, in 1998 (!) states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.
4. To be abundantly clear: The conduct prohibited by Article 51(2), 2nd sentence of Additional Protocol I and Article 13(2), 2nd sentence of Additional Protocol II, namely, acts and threats of violence the primary purpose of which is to spread terror among the civilian population, should be penalized as a crime sui generis. However, this Tribunal is not acting as a legislator; it is under the obligation to apply only customary international law applicable at the time of the criminal conduct, in this case the time between 1992 and 1994. […] The International Tribunal is required to adhere strictly to the principle of *nullum crimen sine lege praevia* and must ascertain that a crime was "beyond any doubt part of customary law." It would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place.
5. It is even less understandable in the present case why the majority chose this wrong approach when it would have been possible to arrive at the same result in an undisputable way: i.e. overturn Galić's conviction under Count 1 and convict him under Counts 4 and 7 for the same underlying criminal conduct, namely the campaign of shelling and sniping, constituting the crime of attacks on civilians, this offence being without any doubt part of customary international law. In light of the finding of the Trial Chamber, which held that Galić "intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo", it would have been furthermore possible to consider this an aggravating circumstance in sentencing […].

Discussion

I. Qualification of the conflict

1. a. *(Trial Chamber, paras 12-31, 96-129)* Does the Trial Chamber qualify the conflict around Sarajevo as international or non-international? Would it have had to do so if unable to refer to the Agreement of 22 May 1992? In order to establish that the acts Galić is accused of are prohibited by IHL? In order to establish the criminalization of such acts?
   b. Does the Agreement of 22 May 1992 make the conflict an international armed conflict? According

to the Majority of the Trial Chamber? (GC I-IV, Art. 3(3) and (4))

c. *(Trial Chamber, Dissenting opinion of Judge Nieto-Navia, paras 108-113)* Does Judge Nieto-Navia qualify the conflict? According to his theory, should he have done so?

II. Attacks against civilians

1. *(Trial Chamber, paras 12-31)* Do both treaty-based and customary IHL prohibit attacks on civilians in both international and non-international conflicts? Do both criminalize them? Does the International Tribunal have jurisdiction? Under customary international law? Treaty-based law? Without the Agreement of 22 May 1992, would the Tribunal have jurisdiction over the crime of attack on civilians? (P I, Art. 51(2); P II, Art. 13(2))
2. *(Trial Chamber, para. 44)* May military necessity justify the targeting of civilians?
3. *(Trial Chamber, paras 47-51)* When will a person not be held liable for the crime of attack on civilians? What if the person attacked was directly participating in hostilities? When is a person considered to be directly participating in hostilities? Does IHL provide the same answers to those questions in international and in non-international armed conflicts? [See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Arts 50 and 51(3); P II, Art. 13)
4. *(Trial Chamber, paras 16-61)* What are the elements that the Trial Chamber found specific to the crime of attack on civilians?
5. *(Trial Chamber, paras 53-56)* Can an individual be convicted of the crime of attack on civilians if he or she had doubts as to the combatant or civilian status of the person or persons attacked? If he or she was not, but should have been, aware of the civilian status of the persons attacked? How can the possibility of attacking civilians be accepted *(para. 54)* by an attacker who is not aware (but should have been aware) of their status *(para. 55)*? Is this recklessness? According to the Trial Chamber? According to the ICRC Commentary?
6. *(Trial Chamber, paras 57-61)* When is an indiscriminate attack a crime of attack on civilians? Is an indiscriminate attack an attack on civilians or may it simply provide evidence for the necessary *mens rea*? When is an attack expected to cause excessive incidental effects upon civilians a crime of attack on civilians? Do indiscriminate attacks and attacks expected to cause excessive incidental effects upon civilians constitute war crimes as such? Or are they criminalized only when they amount to direct attacks on civilians?

III. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population

1. a. *(Appeals Chamber, paras 87-90 and 91-98)* What is the difference between the prohibition of an act and its criminalization? Is an act prohibited under IHL necessarily criminalized under international criminal law? Do the Tadić conditions reflect this difference?

   b. *(Trial Chamber, paras 113-137)* Are all forms of violations of the second sentence of Art. 51(2) of Protocol I criminalized? By Protocol I? By customary international law? By the Agreement of 22 May 1992? [**See** Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] (P I, Art. 85(3)(a))
2. *(Trial Chamber, paras 94-137; Dissenting opinion of Judge Nieto-Navia, paras 108-113)* Do both treaty-based and customary IHL prohibit the use of terror against the civilian population in both international and non-international conflicts? Do both criminalize it? Does the ICTY have jurisdiction? Under

customary international law? Under treaty-based law? Would the Tribunal have jurisdiction over the crime of attack on civilians without the Agreement of 22 May 1992? On which of those questions does Judge Nieto-Navia differ from the Majority? Do you agree with the Majority's findings on what constitutes a crime of terror? (P I, Art. 51(2); P II, Art. 13(2))

3. *(Trial Chamber, paras 133, 158 and 162)* Which elements did the Trial Chamber find to be specific to the crime of terror against the civilian population? Which additional mental element of a crime of terror differentiates it from the crime of attack on civilians?
4. *(Trial Chamber, para. 134; Appeals Chamber, paras 103-104)*
    a. For acts or threats of violence to amount to a crime, is it necessary that they actually cause terror among the civilian population? According to the Trial and Appeals Chambers? Does the Appeals Chamber contradict itself when it adds that "extensive trauma and psychological damage form part of the acts or threats of violence" *(para. 102)*?
    b. If there is no requirement that a threat of violence must actually cause terror, does such a threat fulfil the third Tadić condition, i.e. that the violation "must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim"?
5. *(Trial Chamber, para. 135; Appeals Chamber, para. 102)* Does an attack qualify as directed at combatants or military objectives if its primary purpose is to spread terror among the civilian population? Under Art. 51(2) of Protocol I? Under customary IHL? Is it criminalized? What if the attack is indiscriminate, but its primary purpose is to spread terror among the civilian population? May an attack be considered to be directed at a military objective if its primary purpose is to spread terror among the civilian population, taking into account that for an object to be a military objective, the destruction of that object must offer a definite military advantage? (P I, Art. 52(2)).
6. *(Trial Chamber, Dissenting opinion of Judge Nieto-Navia, paras 108-113; Appeals Chamber, paras 81-85)*
    a. Does Judge Nieto-Navia consider that only violations of customary IHL may be prosecuted before the ICTY (under Art. 3 of its Statute)? Why? Does he disagree with paras 94 and 143 of the ICTY Appeals Chamber Decision on Jurisdiction in the *Tadić* case? [**See** ICTY, The Prosecutor v. Tadić [Part A.]]
    b. According to the Appeals Chamber, may treaty-based violations be prosecuted by the Tribunal if they have not reached customary law status? At least if treaty law criminalizes the relevant conduct? Do treaty rules even in the latter case always define less precisely the elements of the prohibition they criminalize?
7. *(Trial Chamber, paras 113-129; Appeals Chamber, 91-98; Partially dissenting opinion of Judge Schomburg)*
    a. Does the survey by the Majority of the Tribunal of statutory and treaty-based law relevant to the fulfilment of the fourth Tadić condition truly not take a position on whether a customary basis exists for a crime of terror *(para. 113)*? Especially in the light of Judge Schomburg's dissenting opinion in the Appeals Judgement? What other basis does the Majority discuss?
    b. In considering whether the prohibition of terror was criminalized under customary law, should the Trial and Appeals Chambers have dealt with the qualification of the conflict? Does the fact that an act is criminalized when committed during an international armed conflict necessarily mean that the same act is also criminalized if committed during a non-international armed conflict? Do you think that the prohibition of terror is criminalized under customary law in both types of conflict? Because the prohibition is worded the same way in Protocol I and in Protocol II?

8. *(Appeals Chamber, para. 88)* May the Chamber use Art. 33 of Convention IV to attest to the customary nature of Art. 51(2) of Protocol I? Do the two articles cover the same acts? Do they protect the same persons?
9. *(Trial Chamber, paras 158-163)* May an accused be convicted cumulatively for the crime of attack on civilians and for the crime of terror against the civilian population, thus on two counts for the same acts?
10. *(Trial Chamber, paras 208-593; Dissenting opinion of Judge Nieto-Navia, paras 104-107)* Why was it necessary to establish that there was a general campaign of sniping and shelling? For the Majority? For Judge Nieto-Navia? Does the latter agree that such a campaign existed?
11. *(Trial Chamber, para. 247)* Was Sabri Halili a civilian? Is this of any importance for establishing the unlawfulness of the killing of Almasa Konjhodzic? (P I, Art. 50)
12. *(Trial Chamber, paras 373-387)* Was the shelling of the football tournament a violation of IHL even if the Serb forces did not know that such a tournament was taking place? Even if they could not have known? (P I, Art. 51(2), (4) and (5))
13. *(Trial Chamber, paras 564-573)* Was the pattern of shelling and sniping of Sarajevo by Serb forces not militarily necessary because "the Serbs" were the aggressors? Was the shelling a military necessity because "the Bosnians" refused a cease-fire? Are those elements relevant in a discussion on whether the aim of those attacks was to spread terror?

IV. Galić's criminal responsibility

1. *(Trial Chamber, paras 165-177, 609-749; Dissenting opinion of Judge Nieto-Navia, paras 116-120)*
    a. When does a commander bear individual responsibility for acts committed by subordinates? Is an omission sufficient? For the Majority of the Chamber? For Judge Nieto-Navia? When does a commander bear command responsibility? What if he bears both forms of responsibility?
    b. Why is the level of evidence necessary to prove knowledge of criminal activity not as high for commanders operating within a highly disciplined and formalized chain of command as for those persons exercising more informal types of authority? Do you agree with this?
2. *(Trial Chamber, para. 211)* If some attacks on the population of Sarajevo were attributable to the Bosnian government itself, which was in control of the city, would that have relieved Galić of his responsibility for attacks by his forces? What do such attacks by the authorities on their own population tell us about the relevance of violations of IHL in the conflict?
3. Were the factual findings *(paras 609-723)* necessary to hold Galić individually responsible? Why? Does Judge Nieto-Navia in his dissenting opinion (paras 116-120) disagree with the factual findings of the Majority or with the legal standard applied?
4. What relevance do the preliminary remarks made by Judge Nieto-Navia in his dissenting opinion *(paras 4-16)* have for the conviction of Galić? For history's judgement?