UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-98-29/1-A
		Date:	12 November 2009
		Original:	English

IN THE APPEAL CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr John Hocking**

Judgement of: **12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of the appeals filed by the Office of the Prosecutor ("Prosecution")[1] and Counsel for Dragomir Milošević ("Milošević")[2] against the Judgement rendered by Trial Chamber III ("Trial Chamber") on 12 December 2007 in the case of *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T ("Trial Judgement").

A. Background

2. Milošević was born on 4 February 1942, in the village of Murgas, Ub municipality, Serbia.[3] He was an officer in the Yugoslav People's Army ("JNA") and after the proclamation of the Bosnian-Serb Republic (later renamed "Republika Srpska"), he became an officer of the newly-formed Army of the Republika Srpska ("VRS"). From on or about 6 July 1993, Milošević served as Chief of Staff and Deputy Commander in the Sarajevo Romanija Corps ("SRK") of the VRS under General Stanislav Galić ("Galić"). Milošević became Commander of the SRK on or about 10 August 1994 and retained that position until on or about 21 November 1995 ("Indictment period").[4]

3. The events giving rise to these appeals relate to the siege of Sarajevo. The Prosecution charged Milošević with terror, a violation of the laws or customs of war (count 1); murder, a crime against humanity (counts 2 and 5); inhumane acts, a crime against humanity (counts 3 and 6); and

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[1] Prosecution Notice of Appeal, 31 December 2007 ("Prosecution Notice of Appeal"); Prosecution Appeal Brief, 30 January 2008 ("Prosecution Appeal Brief") (collectively, "Prosecution's Appeal").

[2] Defence Notice of Appeal Against the Trial Judgement, French original filed on 11 January 2008 (confidential); English translation filed on 16 January 2008; public redacted version filed in French on 11 May 2009; English translation of the public redacted version filed on 20 October 2009 (jointly, "Defence Notice of Appeal"); Defence Appeal Brief Including Confidential Annexes A and B and Public Annexes C and D, French original filed on 14 August 2008 (confidential); English translation filed on 11 September 2008; public redacted version filed in French on 11 May 2009; English translation of the public redacted version filed on 1 October 2009 (jointly, "Defence Appeal Brief") (collectively, "Milošević's Appeal").

[3] See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Prosecution's Catalogue of Facts Agreed Between the Prosecution and Defence, with Annex A thereto, 28 February 2007, Annex A ("Agreed Facts"), para. 1. The list of the Agreed Facts was admitted by the Trial Chamber on 10 April 2007 (*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts With Dissenting Opinion of Judge Harhoff, 10 April 2007, p. 12).

[4] Trial Judgement, para. 2.

unlawful attacks against civilians, a violation of the laws or customs of war (counts 4 and 7).[5] These crimes were charged under both Article 7(1) (planning and ordering, as well as aiding and abetting the planning, preparation, and/or execution) and Article 7(3) of the Statute (for crimes committed by his subordinates which he knew or had reason to know about and failed to take reasonable and necessary measures to prevent or punish).[6]

4. The Trial Chamber found that during the Indictment period the SRK troops under Milošević's command were responsible for continuously sniping and shelling the area of Sarajevo, resulting in the killing and serious injury of many civilians.[7] It noted that throughout the siege, the civilian population was subjected to conditions of extreme fear and insecurity, which, combined with the inability to leave the city, resulted in "deep and irremovable mental scars on that population as a whole".[8] The Trial Chamber concluded that in these circumstances, every incident of sniping and shelling for which the SRK was found responsible was deliberately conducted with the intent to terrorise the civilian population of Sarajevo.[9] It found that these acts also qualified as unlawful attacks against civilians and civilian population under Article 3 of the Tribunal's Statute ("Statute").[10] Further, the Trial Chamber found that the SRK's military campaign in Sarajevo was a "classical illustration of a large-scale and organised attack, that is, a widespread and systematic attack" constitutive of crimes against humanity.[11]

5. The Trial Chamber also concluded that Milošević's orders to target civilians in Sarajevo formed part of the continuous strategy of sniping and shelling of civilians commenced under Galić's command. It was satisfied that he planned and ordered those attacks with the intent to spread terror among the population.[12] It thus found Milošević guilty pursuant to Article 7(1) of the Statute of the crimes of terror (count 1), murder (counts 2 and 5), and inhumane acts (counts 3 and 6).[13] As a consequence of the conviction entered under count 1, the Trial Chamber dismissed the charges of unlawful attacks against civilians under counts 4 and 7, as impermissibly cumulative on the ground that the elements of the crime of unlawful attack against civilians are fully encompassed

[5] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Amended Indictment, 18 December 2006 ("Indictment"), paras 22-25.
[6] Indictment, paras 19-21.
[7] Trial Judgement, para. 905.
[8] Trial Judgement, para. 910.
[9] Trial Judgement, paras 910-913.
[10] Trial Judgement, para. 953.
[11] Trial Judgement, para. 928.
[12] Trial Judgement, para. 978.
[13] Trial Judgement, para. 1006.

by the crime of terror.[14] The Trial Chamber imposed a single sentence of 33 years of imprisonment.[15]

1. The Appeals

(a) Prosecution's Appeal

6. The Prosecution puts forth a single ground of appeal, in which it alleges that the Trial Chamber erred in imposing a manifestly inadequate sentence in light of the gravity of the crimes for which Milošević was convicted[16] and his role in the crimes.[17] The Prosecution seeks a life sentence, which it deems justified irrespective of any mitigating circumstances applicable to the case, especially in view of the life imprisonment imposed on Galić on appeal.[18]

7. In response, Milošević argues that the facts underlying his convictions were not established beyond reasonable doubt, rendering the sentencing matters moot.[19] In the alternative, he insists that all relevant mitigating circumstances taken into account by the Trial Chamber should be maintained.[20]

(b) Milošević's Appeal

8. Milošević seeks an acquittal of all charges.[21] He sets forth twelve grounds of appeal. First, he argues that the Trial Chamber misapplied the law on the crime of terror and the crimes against humanity of murder and inhumane acts, violated the presumption of innocence and failed to establish beyond reasonable doubt the essential elements of the crimes he was convicted of.[22] Milošević further contends that the Trial Chamber violated Rule 89 of the Rules of Procedure and Evidence ("Rules") by making findings not supported by evidence on the record and failing to consider the evidence as a whole.[23] Milošević alleges that the Trial Chamber erroneously set out and applied the law with respect to the civilian status of the trams targeted in sniping incidents, the

[14] Trial Judgement, paras 981, 1007.
[15] Trial Judgement, para. 1008.
[16] Prosecution Appeal Brief, paras 5-21.
[17] Prosecution Appeal Brief, paras 22-31.
[18] Prosecution Appeal Brief, paras 32-43. See also Prosecution Reply Brief, 12 August 2008 ("Prosecution Reply Brief"), paras 2-3.
[19] Defence Respondent's Brief with Annex 1, French original filed on 6 August 2008; English translation filed on 13 August 2008 ("Defence Response Brief"), para. 5.
[20] Defence Response Brief, para. 6.
[21] Defence Appeal Brief, p. 94.
[22] Defence Appeal Brief, paras 6-145 (Ground 1).
[23] Defence Appeal Brief, paras 146-150 (Grounds 2 and 3).

definition of "siege" and on the issue of his alibi defence.[24] Furthermore, Milošević contests the Trial Chamber's factual findings that areas of Sarajevo were "civilian zones";[25] that the SRK was behind specific sniper fire[26] or mortar shelling;[27] as well as the findings concerning the possession, use and origin of aerial bombs.[28] Milošević further challenges the Trial Chamber's findings that he ordered the sniping and shelling of civilians.[29] Finally, on the matter of sentencing, Milošević argues that the Trial Chamber wrongly considered the elements of the crimes as aggravating factors.[30]

9. The Prosecution responds that Milošević's Appeal should be dismissed in its entirety.[31]

10. The Appeals Chamber notes that Milošević's brief in reply[32] was filed one day after the expiration of the deadline provided for in Rule 113 of the Rules. Milošević does not present any arguments that would show good cause for the delay. However, considering that (i) this late filing did not cause any disruption in the advancement of the appellate proceedings; (ii) it is in the interest of justice to provide Milošević with the opportunity to reply to the Prosecution Response Brief; and that (iii) the Prosecution never objected to the late filing of the Defence Reply Brief, the Appeals

[24] Defence Appeal Brief, paras 151-157 (Ground 4). The Appeals Chamber notes that under the second sub-ground of his fourth ground of appeal Milošević challenges the civilian status of Derviša Selmanović and that of the victims of the shelling of the Markale Market on 28 August 1995. The Appeals Chamber addresses Milošević's submissions in this regard in its analysis of the related arguments under Milošević's first and seventh grounds of appeal.
[25] Defence Appeal Brief, paras 167-169 (Ground 6).
[26] Defence Appeal Brief, paras 170-234 (Ground 7).
[27] Defence Appeal Brief, paras 235-287 (Ground 8).
[28] Defence Appeal Brief, paras 288-317 (Grounds 9, 10 and 11).
[29] Defence Appeal Brief, para. 318 (Ground 12).
[30] Defence Appeal Brief, para. 158 (Ground 5). The Appeals Chamber notes that in his Notice of Appeal Milošević refers to two Decisions of the Trial Chamber dated 20 July 2007 and 23 July 2007 respectively (Defence Notice of Appeal, paras 12-15 (sub-section titled "Erroneous Decisions Made During the Proceedings"). Without further elaborating on this matter, in his Appeal Brief Milošević merely requests the Appeals Chamber to quash the said decisions (Defence Appeal Brief, p, 94). Being unable to discern any relevant argument in relation to these decisions under any of his grounds of appeal, the Appeals Chamber will not entertain Milošević's request.
[31] Prosecution Response Brief, 23 September 2008 (confidential) ("Prosecution Response Brief"), para. 13. Unless otherwise specifically indicated, the Appeals Chamber will refer to the public redacted version of "Prosecution Response Brief" (Notice Changing Status of the Public Redacted Version of Prosecution Response Brief Filed on 7 October 2008 and Filing of New Public Redacted Version, 15 May 2009).
[32] Brief in Reply Filed by the Defence, French original filed on 9 October 2008 (confidential); English translation filed on 15 October 2008; public redacted version filed on 19 March 2009 in French; English translation filed on 15 April 2009 (collectively, "Defence Reply Brief").

Chamber finds it appropriate to exercise its discretion and recognize the Defence Reply Brief as validly filed.[33]

11. The Appeals Chamber heard oral submissions of the parties regarding these Appeals on 21 July 2009. Having considered the written and oral submissions of Milošević and the Prosecution, the Appeals Chamber hereby renders its Judgement. The Appeals Chamber will not necessarily address the grounds of appeal in the order presented by the parties, but rather group them by subject matter where appropriate.

[33] *Cf.* Rule 127(A)(ii) of the Rules.

II. STANDARD OF REVIEW

12. On appeal, parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice. These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of both the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR").[34] In exceptional circumstances, the Appeals Chamber will also hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the Trial Judgement, but is nevertheless of general significance to the Tribunal's jurisprudence.[35] Article 25 of the Statute also states that the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

13. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law.[36] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that an appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[37]

14. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[38] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the

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[34] *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6; *Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11.

[35] *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8; *Orić* Appeal Judgement, para. 7; *Hadžihasanović and Kubura* Appeal Judgement, para. 7; *Nahimana et al.* Appeal Judgement, para. 12.

[36] *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Strugar* Appeal Judgement, para. 11; *Hadžihasanović and Kubura* Appeal Judgement, para. 8. See also *Ntagerura et al.* Appeal Judgement, para. 11; *Muvunyi* Appeal Judgement, para. 9, quoting *Ntakirutimana* Appeal Judgement, para. 11; *Seromba* Appeal Judgement, para. 10; *Nahimana et al.* Appeal Judgement, para. 12.

[37] *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9.

[38] *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 8.

correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[39] In so doing, the Appeals Chamber not only corrects the legal error, but when necessary applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[40] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[41]

15. When considering alleged errors of fact, the Appeals Chamber will apply the standard of reasonableness. As a general principle, in reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[42] In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[43] Further, only an error of fact that has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[44]

16. The Appeals Chamber recalls that it has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[45] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party's arguments on appeal, the party is

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[39] *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 9; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Karera* Appeal Judgement, para. 9.

[40] *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9.

[41] *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Hadžihasanović and Kubura* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8.

[42] *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Hadžihasanović and Kubura* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Muvunyi* Appeal Judgement, para. 10.

[43] *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 10; *Strugar* Appeal Judgement, para. 13; see also *Kupreškić* et al. Appeal Judgement, para. 30.

[44] *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10.

expected to present its case clearly, logically, and exhaustively. Likewise, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[46]

17. When applying these basic principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which are bound to be summarily dismissed.[47] In particular, the Appeals Chamber will dismiss without detailed analysis (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the Trial Chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the Trial Chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate error; and (x) mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[48]

18. Finally, where the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but essentially challenges the Trial Chamber's factual findings in terms of its assessment of evidence, it will either analyse these

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[45] *Mrkšić and Šljivančanin* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, para. 16; *Karera* Appeal Judgement, para. 12.

[46] *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 16; *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, paras 13-14 and references cited therein; *Karera* Appeal Judgement, para. 12.

[47] *Krajišnik* Appeal Judgement, para. 17; *Martić* Appeal Judgement, para. 15; *Strugar* Appeal Judgement, para. 17.

[48] *Krajišnik* Appeal Judgement, paras 17-27; *Martić* Appeal Judgement, paras 14-21; *Strugar* Appeal Judgement, paras 18-24; *Brdanin* Appeal Judgement, paras 17-31; *Galić* Appeal Judgement, paras 256-313.

allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.[49]

[49] *Cf. Strugar* Appeal Judgement, paras 252, 269.

III. ALLEGED FAILURE TO ESTABLISH THE ESSENTIAL ELEMENTS OF CRIMES (MILOŠEVIĆ'S FIRST GROUND OF APPEAL)

19. Milošević argues that the Trial Chamber erred by failing to establish beyond reasonable doubt his guilt for the crimes of which he was convicted, notably terror, murder and inhumane acts.[50] He submits that in so doing, the Trial Chamber "violated the legal norms" governing the crimes in question, as well as the presumption of innocence.[51] Specifically, Milošević argues that while both the *actus reus* of the crime of terror and the *chapeau* element for crimes against humanity require acts "directed against the civilian population",[52] the Trial Chamber failed to establish beyond reasonable doubt that the attacks carried out by the SRK were in fact directed against civilians.[53] In his opinion, this error invalidates the Trial Chamber's findings on terror (count 1) and all crimes against humanity (counts 2, 3, 5, and 6).[54] Further, Milošević submits that the Trial Chamber failed to establish beyond reasonable doubt the *mens rea* of the crime of terror and the causal link required for the crimes against humanity of murder and inhumane acts.[55] Following a few preliminary observations, the Appeals Chamber will consider Milošević's challenges related to the elements of the crime of terror and then proceed with the analysis of the remainder of his arguments under this ground of appeal.

A. Preliminary issues

1. Standard of proof beyond reasonable doubt

20. Throughout his appeal and under this ground in particular, Milošević claims that certain conclusions could not have been reached beyond reasonable doubt.[56] The Appeals Chamber recalls that the standard of proof "requires a finder of fact to be satisfied that there is no reasonable

[50] Defence Notice of Appeal, para. 6; Defence Appeal Brief, p. 2, paras 10, 24, 161. For legal findings relevant to these crimes, see Trial Judgement, paras 869-888 and 914-938. The Appeals Chamber adopts the Trial Chamber's approach of referring to the crime in question as "terror" for purposes of consistency, but notes that its appropriate qualification is crime of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population". See *Galić* Appeal Judgement, paras 102-104, discussing the elements of the crime.
[51] Defence Notice of Appeal, para. 5; Defence Appeal Brief, p. 2.
[52] Defence Appeal Brief, paras 18-19.
[53] Defence Appeal Brief, paras 22, 24; Defence Reply Brief, para. 8.
[54] Defence Appeal Brief, para. 22.
[55] Defence Appeal Brief, paras 130-142.
[56] Defence Appeal Brief, p. 2, referring to Defence Notice of Appeal, paras 5-6; Defence Appeal Brief, para. 162.

explanation of the evidence other than the guilt of the accused".[57] The Appeals Chamber also emphasizes that "for a finding of guilt on an alleged crime, a reasonable trier of fact must have reached the conclusion that all the facts which are material to the elements of that crime have been proven beyond reasonable doubt by the Prosecution".[58] Therefore, not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends.[59] The Appeals Chamber also recalls that as a general rule, the standard of appellate review, namely whether "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt", permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial".[60] However, an inference drawn from circumstantial evidence to establish a fact that is material to the conviction or sentence cannot be upheld on appeal if another reasonable conclusion consistent with the non-existence of that fact was also open on that evidence, given that such inference should be the only reasonable one.[61]

21. In the present case, the Trial Chamber explicitly referred to the principle laid down in Article 21(3) of the Statute that an accused is presumed innocent until proven guilty.[62] It also correctly specified that in order to enter a conviction, each element of the crime and the mode of liability, as well as any fact that is indispensable for the conviction, must be proven beyond

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[57] *Mrkšić and Šljivančanin* Appeal Judgement, para. 220; *Martić* Appeal Judgement, para. 61.

[58] *Martić* Appeal Judgement, para. 55; *Čelebići* Trial Judgement, para. 601; *Halilović* Appeal Judgement, para. 109. See also *Kvočka et al.* Appeal Judgement, para. 23:

> The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98*ter*(C) of the Rules. However, this requirement relates to the Trial Chamber's Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. […] (footnotes omitted).

[59] *Ntagerura et al.* Appeal Judgement, paras 174-175. See also *Mrkšić and Šljivančanin* Appeal Judgement. para. 217, recalling that "a trier of fact should render a reasoned opinion on the basis of the entire body of evidence and without applying the standard of proof 'beyond reasonable doubt' with a piecemeal approach".

[60] *Ntagerura et al.* Appeal Judgement, para. 305, citing *Kordić and Čerkez* Appeal Judgement, para. 288.

[61] *Čelebići* Appeal Judgement, para. 458. The Appeals Chamber recalls that, in such cases, "the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven" (*Stakić* Appeal Judgement, para. 219). See also *Karera* Appeal Judgement, para. 34.

[62] Trial Judgement, para. 8.

reasonable doubt.[63] Concerning circumstantial evidence, the Trial Chamber held that any conclusion from such evidence "must be the *only* reasonable conclusion available".[64] After delineating the standard, the Trial Chamber explicitly stated that the findings in the Judgement are made on the basis of proof beyond reasonable doubt.[65] Accordingly, the Appeals Chamber rejects Milošević's general submission that the Trial Chamber did not apply the proper standard of proof. It notes, however, that this does not in principle prevent Milošević from alleging errors of law with regard to specific factual findings.[66]

22. The Appeals Chamber further observes that in several instances, the Trial Chamber uses confusing language which could be viewed as shifting of the burden of proof onto the Defence to disprove the Prosecution's case. In such instances, the Trial Chamber stated that "nothing in the evidence suggests" that a conclusion opposite to the one adopted by the Trial Chamber could be reached.[67] The Appeals Chamber finds this language misleading and stresses that the Trial Chamber is required not only to apply the appropriate standard but also to articulate it correctly. That said, the Appeals Chamber considers that, subject to the analysis of the parties' specific challenges below, the Trial Chamber in fact meant to state that all reasonable doubt was eliminated on the basis of the evidence cited in all such instances.

2. Applicability of Additional Protocols

23. The Appeals Chamber notes that the Trial Chamber did not establish the nature of the armed conflict concerned by the Indictment.[68] Given that the Indictment charged Milošević under Article 51(2) of Additional Protocol I and, in the alternative, Article 13(2) of Additional Protocol II, the Trial Judgement cites to both Protocols without specifying which of them applies to the conflict at issue. Although the Appeals Chamber considers that the Trial Chamber should have made a clear finding as to the nature of the armed conflict or the applicability of the Additional Protocols,[69] the Appeals Chamber finds the references to the relevant provisions of both Additional Protocols permissible given that they form part of customary international law and apply both in international and internal armed conflicts.[70] The Appeals Chamber further notes that the Trial Chamber referred

[63] Trial Judgement, para. 8.
[64] Trial Judgement, para. 8.
[65] Trial Judgement, para. 8.
[66] See also *infra*, Section III.C.2.(e), paras 88 *et seq.*
[67] *E.g.*, Trial Judgement, paras 250, 266, 276, 289, 310, 324, 341, 354, 364, 393.
[68] Trial Judgement, paras 870-872.
[69] *Cf. Galić* Trial Judgement, paras 22-25.
[70] *Galić* Appeal Judgement, paras 86-87.

to Additional Protocol I, notably in defining the notion of "civilians".[71] It recalls in this respect that the definition of civilians contained in Article 50 of Additional Protocol I applies to crimes under both Article 3 and Article 5 of the Statute,[72] and finds that, provided that the direct participation in hostilities is adequately taken into account,[73] the application of this definition is appropriate in this case.[74] Additionally, the Appeals Chamber notes that Additional Protocol I was incorporated into Yugoslavia's Armed Forces Regulations on the Application of the International Laws of War.[75]

B. Crime of terror

1. Arguments of the parties

24. Milošević contests the Trial Chamber's findings on the elements of the crime of terror. Referring to the principles expounded by the Appeals Chamber in *Galić,* he suggests that the Trial Chamber erroneously conflated the *actus reus* and *mens rea* of the crime .[76]

25. In particular, Milošević argues that the Trial Chamber committed an error of law in failing to articulate the indicia from which the specific intent to spread terror could be inferred, notably the nature of the civilian activities targeted, as well as the manner, timing, and duration of the attacks.[77] Arguing that all the activities of the SRK were justifiable, thus lawful, military action,[78] Milošević submits that the Trial Chamber erred in failing to determine beyond reasonable doubt that spreading terror was the primary purpose of the attacks.[79]

26. Milošević also submits that the Trial Chamber erred in law by (i) allowing evidence of the actual terror experienced by the civilian population to be admitted for corroboration of the intent to

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[71] Trial Judgement, paras 921-924.
[72] *Martić* Appeal Judgement, paras 299, 302.
[73] See *infra*, Section III.C.1.(b)(iii), paras 57-58.
[74] *Cf. Strugar* Appeal Judgement, para. 187, where the Appeals Chamber found that because the Trial Chamber had not concluded on the nature of the armed conflict (thus not limiting the applicability of the international humanitarian law), it was necessary to analyse whether the alleged victims of the war crimes, although not actively participating in the hostilities, could not have been otherwise constituted lawful targets, such as being combatants or being injured as a result of a proportionate attack.
[75] Agreed Facts, para. 24.
[76] Defence Appeal Brief, paras 15-18, 130-140, referring to *Galić* Appeal Judgement, paras 100-104, 140.
[77] Defence Appeal Brief, para. 134; see also Defence Appeal Brief, para. 132, referring to *Galić* Appeal Judgement, paras 104, 107.
[78] Defence Appeal Brief, para. 133.
[79] Defence Appeal Brief, para. 134; see also Defence Appeal Brief, para. 131, referring to *Galić* Appeal Judgement, para. 104.

spread terror,[80] and (ii) considering indiscriminate attacks to be evidence of specific intent, when it may only serve as an indicia of one of the elements of the *actus reus* of the crime of terror.[81] On the other hand, Milošević submits that an inference relating to the *mens rea* could be drawn from, for example, an attack with "no discernible significance in military terms"[82] or, as considered by the Trial Chamber in the instant case, attacks during ceasefires, prolonged attacks on civilians, and attacks during the siege of a city.[83]

27. As to the elements of the crime of terror, Milošević submits that it encompasses the crime of unlawful attacks against civilians with the specific intent to spread terror among civilians or among the civilian population as a whole.[84]

28. The Prosecution responds that the Trial Chamber reasonably concluded that the primary purpose of the attacks was to spread terror among the civilian population.[85] It first contends that Milošević's military justification argument fails as the attacks were directed against the civilian population.[86] Second, it notes that the Trial Chamber did identify and consider the indicia of the intent to spread terror, and argues that Milošević has failed to show that the Trial Chamber applied an incorrect legal standard or that its findings of fact were erroneous.[87] Third, it submits that while the actual infliction of terror does not form part of the physical element of the crime, it is a valid consideration for its mental element.[88] The Prosecution further argues that there is no rule prohibiting the Trial Chamber from considering the indiscriminate nature of the attack in determining both the *actus reus* and *mens rea* of the crime of terror,[89] and that Milošević has failed to demonstrate how the Trial Chamber erred in relying on the siege of Sarajevo or attacks during ceasefire to establish the requisite intent.[90]

29. Concerning the elements of the crime of terror, the Prosecution asserts that in contrast to the crime of unlawful attacks against civilians, the crime of terror does not require proof of an attack

[80] Defence Appeal Brief, para. 136, referring to Trial Judgement, para. 880.
[81] Defence Appeal Brief, para. 137, referring to Trial Judgement, para. 881.
[82] Defence Appeal Brief, para. 132.
[83] Defence Appeal Brief, para. 138, referring to Trial Judgement, para. 881.
[84] AT. 80.
[85] Prosecution Response Brief, para. 62.
[86] Prosecution Response Brief, para. 63, referring to Prosecution Response Brief, para. 16 and following.
[87] Prosecution Response Brief, para. 64, referring to Trial Judgement, para. 881.
[88] Prosecution Response Brief, para. 65.
[89] Prosecution Response Brief, para. 66.
[90] Prosecution Response Brief, para. 67.

which results in death or serious injury to body or health of civilians. In its view, this is confirmed by the fact that the crime of terror can be committed through mere threats of violence.[91] Accordingly, it submits that the crime of terror consists of the following elements: "First, the acts or threats of violence; second, the direct or indirect intent for these acts or threats of violence; and third, the specific intent to spread terror among the civilian population."[92] As to the nature of the acts and threats of violence, the Prosecution submits that to satisfy the Tribunal's jurisdictional requirements, they "must be capable of causing extreme fear in the population."[93]

2. Analysis

30. In the *Galić* Appeal Judgement, the Appeals Chamber stated that "the prohibition of terror against the civilian population as enshrined in article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was part of customary international law from the time of its inclusion in those treaties."[94] It also held, by majority, that "a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law at the time of the commission of the offences" at stake in that case,[95] which took place earlier than the crimes of which Milošević is convicted. In the present case, the parties have not raised the issue of jurisdiction on appeal and the Appeals Chamber, by majority, Judge Liu dissenting, finds no reason to depart from its previous findings recalled above.

(a) Elements of the crime

31. In defining the crime of terror, the Trial Chamber held that in addition to the elements common to offences under Article 3 of the Statute, the crime of terror consists of the following specific elements:

> 1. Acts or threats 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;

[91] Prosecution Response Brief, paras 53, 55.
[92] AT. 106.
[93] AT. 108, referring to *Prosecutor v. Duško Tadić a/k/a "Dule",* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").
[94] *Galić* Appeal Judgement, para. 86.
[95] *Galić* Appeal Judgement, para. 86.

> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[96]

32. The Appeals Chamber recalls that when noting Article 49 (1) of Additional Protocol I, the *Galić* Appeals Chamber held that the crime of terror can comprise attacks or threats of attacks against the civilian population.[97] It did not limit the possible consequences of such attacks to death or serious injuries among the victims.[98] Rather, it concentrated on the assessment of whether the allegations before it would qualify for the crime of terror under international customary law.

33. The Appeals Chamber finds that the Trial Chamber misinterpreted the *Galić* jurisprudence by stating that "actual infliction of death or serious harm to body or health is a required element of the crime of terror",[99] and thus committed an error of law. Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*. What is required, however, in order for the offence to fall under the jurisdiction of this Tribunal, is that the victims suffered grave consequences resulting from the acts or threats of violence;[100] such grave consequences include, but are not limited to death or serious injury to body or health. Accordingly, because the Trial Chamber established in the present case that all the incidents imputed to the SRK constituted unlawful attacks against civilians, and thus caused death or serious injury to body or health of civilians,[101] the threshold of gravity

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[96] Trial Judgment, para. 875; *Galić* Trial Judgement, para. 133; *Galić* Appeal Judgement, paras 100, 101.
[97] *Galić* Appeal Judgement, para 102.
[98] *Galić* Appeal Judgement, para 102.
[99] Trial Judgement, paras 876, 880.
[100] In paragraph 94 of its *Tadić* Jurisdiction Decision, the Appeals Chamber held that for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions must be satisfied:

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

[101] Trial Judgement, paras 911-913, 953.

required for the crime of terror based on those incidents has been met. Whereas the nature of the acts of violence or threats thereof constitutive of the crime of terror can vary,[102] the Appeals Chamber is satisfied that the *actus reus* of the crime of terror has been established in this case and does not find it necessary to explore the matter any further.

34. As for the Prosecution's submission that the crime of terror has no result requirement provided that the underlying acts or threats of violence are "capable of spreading terror",[103] the Appeals Chamber notes that the *travaux préparatoires* to Additional Protocol I show that there had been attempts among the delegations to introduce "acts capable of spreading terror" into the language of the prohibition enshrined under Article 51(2) thereof.[104] However, these proposals were not reflected in the final text of the provision.[105] In addition, the Appeals Chamber considers that the definition of the *actus reus* of the crime of terror suggested by the Prosecution, notably "acts capable of spreading terror", does not necessarily imply grave consequences for the civilian population and thus does not *per se* render the violation of the said prohibition serious enough for it to become a war crime within the Tribunal's jurisdiction.

35. The Appeals Chamber further recalls that the *Galić* Appeal Judgement clarifies that while "extensive trauma and psychological damage form part of the acts or threats of violence", the "actual terrorisation of the civilian population is not an element of the crime".[106] It should be noted, however, that evidence of actual terrorisation may contribute to establishing other elements of the crime of terror.[107] The Trial Chamber in the instant case established that the incidents had had a psychological impact on the population of Sarajevo.[108] In the circumstances of the case, such psychological impact also satisfies the required gravity threshold.[109]

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[102] *Galić* Appeal Judgement, para 102.
[103] AT. 122-123.
[104] *Travaux Préparatoires*, Vol. III, CDDH/III/38, p. 203, CDDH/III/51, p. 206; Vol. XIV, CDDH/III/SR. 8, pp. 60, 64.
[105] The committee entrusted with the consideration of draft Article 51 submitted the following with regard to the prohibition of spreading terror: "The prohibition of 'acts or threats of violence which have the primary object of spreading terror is directed to intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror' that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful." (*Galić* Appeal Judgement, para. 103, citing *Travaux préparatoires,* Vol. XIV, CDDH/215/Freq., p. 274).
[106] *Galić* Appeal Judgement, paras 102, 104.
[107] See *Galić* Appeal Judgement, para. 107.
[108] Trial Judgement, paras 740-746, 910.
[109] See *supra*, para. 33. See also the Prosecution's oral submissions in this regard (AT. 118).

36. Consequently, the Appeals Chamber finds that the Trial Chamber's legal error regarding the *actus reus* of the crime of terror is without impact on its analysis of the evidence of the case and eventually on the findings of guilt.

(b) Establishing the required *mens rea*

37. The Appeals Chamber notes that the *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population.[110] While spreading terror must be the *primary* purpose of the acts or threats of violence, it need not be the only one.[111] The *Galić* Appeal Judgement suggests that such intent can be inferred from the "nature, manner, timing and duration" of the acts or threats.[112] However, this is not an exhaustive list of mandatory considerations but an indication of some factors that *may* be taken into account according to the circumstances of the case. Contrary to Milošević's assertion, in the instant case the Trial Chamber did explicitly state and consider these factors.[113] Furthermore, the Appeals Chamber rejects Milošević's argument that the Trial Chamber could not take into account the evidence relative to the *actus reus* of the crime when establishing the *mens rea.* In this regard, the Appeals Chamber finds that both the actual infliction of terror and the indiscriminate nature of the attack were reasonable factors for the Trial Chamber to consider in determining the specific intent of the accused in this case.

38. Concerning Milošević's allegation that the Trial Chamber failed to establish beyond reasonable doubt that the primary purpose of the attacks was to spread terror, the Appeals Chamber notes that he fails to support his allegation with any specific arguments. In fact, the Trial Chamber based its relevant conclusions on facts that it established beyond reasonable doubt, such as (i) the SRK was responsible for the sniping and shelling resulting in death or serious injuries within the civilian population of the affected areas; (ii) the shelling was either directly aimed at the civilian population and objects (mortar fire) or carried out in an indiscriminate manner, including the use by the SRK of such "highly inaccurate and indiscriminate weapon" as the modified air bomb; (iii) the very role of snipers requires deliberate shots intended to kill or injure the victim; and (iv) the fact that the campaign of shelling and sniping the civilian population by the troops under Milošević's

[110] *Galić* Appeal Judgement, para. 104.
[111] *Galić* Appeal Judgement, para. 104.
[112] *Galić* Appeal Judgement, para. 104.
[113] Trial Judgement, para. 881.

command continued for a period of over 14 months.[114] Subject to its analysis of Milošević's particular challenges to the underlying evidence, the Appeals Chamber cannot discern any error in the Trial Chamber's approach.

(c) Cumulative convictions

39. In light of the Appeals Chamber's conclusions above with respect to the Trial Chamber's error in defining the *actus reus* of the crime of terror, the Appeals Chamber finds it necessary to provide guidance with respect to the applicable law on cumulative convictions in relation to the crime of terror and unlawful attacks against civilians. In this respect, the Appeals Chamber recalls the two-pronged test articulated in the *Čelebići* Appeal Judgement[115] and emphasizes that the focus of the analysis is to be placed on the legal elements of each crime, rather than on the underlying conduct of the accused.[116] With respect to the offence of unlawful attacks against civilians, the Appeals Chamber recalls that it requires proof of death or serious injury to body or health, which, as explained in paragraph 33 above, is not *per se* an element of the crime of terror. Conversely, the offence of terror requires proof of an intent to spread terror among the civilian population which is not an element of the crime of unlawful attacks against civilians. Therefore, the Appeals Chamber finds that each offence has an element requiring proof of a fact not required by the other, thus allowing cumulative convictions. The Trial Chamber's conclusion to the contrary was, accordingly, erroneous.

40. Having clarified the applicable law, the Appeals Chamber notes that the matter of cumulative convictions was not appealed by the Prosecution.[117] Accordingly, the Appeals Chamber declines to consider the matter any further.

3. Conclusion

41. In light of the foregoing, the Appeals Chamber dismisses this sub-ground of appeal, Judge Liu Daqun dissenting with respect to the Tribunal's jurisdiction over the crime of terror and the elements of the offence.

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[114] Trial Judgement, paras 905-913.
[115] *Čelebići* Appeal Judgement, paras 412-413.
[116] *Stakić* Appeal Judgement, para. 356.
[117] Although arguing that the crime of terror has distinct material elements when compared to the unlawful attacks against civilians (AT. 106-109), the Prosecution has not appealed the Trial Chamber's findings regarding the cumulation of the convictions for these two crimes. Milošević, on the other hand, appears to concur with the erroneous approach of the Trial Chamber with respect to both the elements of the crime of terror and the issue of cumulation (AT. 127).

C. Acts directed against a civilian population

42. The targeting of the civilian population underlies Milošević's convictions for both the crime of terror and the crimes against humanity (murder and inhumane acts).[118] Milošević notes that the unlawful acts of violence attributed to him consist of a campaign of shelling and sniping against civilians.[119] He submits that the Trial Chamber failed to establish beyond reasonable doubt that the attacks carried out by the SRK were directed against civilians or that civilians were the victims of these attacks.[120] The Appeals Chamber will first consider Milošević's challenges related to the definition of a civilian population and the manner of determining its existence, including the presence of the military and the onus of proof. It will then discuss Milošević's arguments on the factors to be considered when determining whether an attack was directed against civilians. Finally, it will deal with Milošević's arguments on the factual findings for particular incidents.[121]

1. The definition of "civilian population"

(a) Arguments of the parties

43. Milošević alleges that the Trial Chamber erred by failing to state specifically the law applied in its determination of the civilian status of the population in certain areas of Sarajevo.[122] Emphasising that the Prosecution bears the burden of proof as to the civilian status of a person,[123] Milošević contends that the Trial Chamber erred in law by failing to specify that the presumption of a person's civilian status, as embodied in Article 50(1) of Additional Protocol I, does not apply when members of the armed forces are tried before a criminal jurisdiction.[124]

44. Milošević submits that the Trial Chamber erred with respect to the factors it considered in determining the civilian status of the population and areas. Notwithstanding Article 50(3) of Additional Protocol I, he argues that the number of soldiers present within the civilian population should be considered in determining whether the population retains its civilian status.[125] He

[118] Trial Judgement, paras 875, 882, 921-924.
[119] Defence Appeal Brief, para. 23.
[120] Defence Appeal Brief, paras 22, 24.
[121] Defence Appeal Brief, para. 24, referring to Defence Notice of Appeal, para. 11.
[122] Defence Appeal Brief, para. 27. In this context, Milošević refers to Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ("Third Geneva Convention"); Article 50, para. 2 of Additional protocol I; *Blaškić* Appeal Judgement, para. 114 (Defence Appeal Brief, paras 28, 29).
[123] Defence Appeal Brief, para. 30, referring to *Blaškić* Appeal Judgement, para. 111.
[124] Defence Appeal Brief, para. 30.
[125] Defence Appeal Brief, para. 31, referring to *Blaškić* Appeal Judgement, para. 115.

contends that the presence of a limited number of civilians in "combat areas replete with military objectives" should not deprive the area of its military status.[126] Milošević further submits that the Trial Chamber erred in law by failing to consider the military nature of the objectives in the combat zones, notably the ABiH-held areas of Sarajevo attacked by the SRK.[127] Milošević reiterates that the burden of proof that the object in question is not used for the purposes of contribution to military action rests on the Prosecution.[128]

45. The Prosecution responds that the presence of ABiH soldiers or military objects in a certain area neither makes it a military zone, nor necessarily deprives the civilian population of its civilian character.[129] The principle of distinction requires attacks to be directed only against military objectives, while attacks directed against civilians or indiscriminate attacks are prohibited. Acknowledging that legitimate civilian casualties may be possible, the Prosecution underlines that they must not be disproportionate to the concrete and direct military advantage anticipated before the attack.[130]

46. The Prosecution also responds that it is erroneous to suggest that the entire combat area is a military target.[131] In the Prosecution's view, only confined areas may potentially be considered legitimate military objectives, such as narrow passages or strategic points like hills or mountain passages, and not "whole parts of a city" as suggested by Milošević.[132] Consequently, Milošević's argument that the Trial Chamber committed an error of law in failing to assess the nature, location, purpose, or use of some objects is, according to the Prosecution, based on the erroneous assumption that certain areas of Sarajevo could be characterised as a "military zone".[133]

47. With respect to the definition of civilian population, the Prosecution submits that the Trial Chamber followed the jurisprudence of the Tribunal and properly set out the law.[134] Finally, the

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[126] Defence Appeal Brief, para. 31, referring to Article 50(3) of Additional Protocol I (footnote omitted from cited passage); AT. 48-51, 54-58, 60-62, 64.
[127] Defence Appeal Brief, para. 32, referring to the Trial Judgement, paras 342, 379, 480, 896-903; Article 52(2) of Additional Protocol I and paras 2020-2022 of the ICRC Commentary to the Additional Protocols.
[128] Defence Appeal Brief, para. 32.
[129] Prosecution Response Brief, paras 23, 31, referring to *Kordić and Čerkez* Appeal Judgement, para. 50.
[130] Prosecution Response Brief, para. 23, referring to *Galić* Appeal Judgement, para. 190 and Articles 48, 51(2), 51(4), 52(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.
[131] Prosecution Response Brief, para. 24, citing Article 51(5)(a) of Additional Protocol I.
[132] Prosecution Response Brief, para. 25.
[133] Prosecution Response Brief, paras 25-26.
[134] Prosecution Response Brief, paras 27-31.

Prosecution responds that Milošević has failed to show that the Trial Chamber presumed the civilian character of persons and objects.[135] It asserts in this respect that the Trial Chamber's statement that in case of doubt a person shall be considered a civilian is merely an affirmation of the criterion that should guide members of the armed forces in choosing targets.[136]

(b) Analysis

48. The Appeals Chamber notes at the outset that a number of Milošević's arguments were considered at trial, in particular that combat zones and everything in the vicinity of the confrontation line were legitimate military targets, and that the acts of violence were neither directed against the civilian population as such or against civilian persons and facilities, nor indiscriminate in nature.[137] In this regard, the Appeals Chamber recalls that an appeal is not a *de novo* review of a Trial Chamber's decision. Consequently, the Appeals Chamber will only address those submissions that aim to establish that the Trial Chamber committed a specific error of law or fact invalidating the decision or that it weighed relevant or irrelevant considerations in an unreasonable manner.[138]

49. The Trial Chamber held that in order to enter a conviction for the crime of terror, it must be established that the underlying acts were committed with the primary purpose of spreading terror among the civilian population.[139] Subject to the Appeals Chamber's clarifications with respect to the elements of the crime of terror above,[140] the Appeals Chamber is satisfied that establishing that the acts of violence (attacks) were directed against the civilian population is indispensable for all

[135] Prosecution Response Brief, para. 32.
[136] Prosecution Response Brief, para. 32.
[137] See, for example, Trial Judgement, para. 199, referring to *Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Defence Final Brief (Rule 86 (B)) with Public Annex A, 19 October 2007 (confidential) ("Defence Final Brief"), para. 38 and Trial Judgement, para. 890, referring to Defence Final Brief, p. 80.
[138] See *supra*, Section II, para. 17(vii). See also *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 16; *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-AR73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling That Judge Canivell is Unable to Continue Sitting in This Case, 15 September 2006, para. 9; *Prosecutor v. Zdravko Tolimir et al.,* Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 6.
[139] Trial Judgement, paras 882, 953.
[140] See *supra*, Section III.B.2, paras 32-35.

the crimes for which Milošević was convicted, *i.e.* the crime of terror and the relevant crimes against humanity.

(i) The term "civilian population"

50. The Trial Chamber clearly defined the term "civilian population" in its discussion of the *chapeau* requirement of crimes against humanity on the basis of the established jurisprudence of the Tribunal and Article 50(2) of Additional Protocol I.[141] Although the Trial Chamber did not define the term expressly with regard to the crime of terror, the Appeals Chamber recalls that the definition of civilians contained in Article 50 of Additional Protocol I applies to crimes under both Article 3 and Article 5 of the Statute.[142] In its discussion, the Trial Chamber found that the term "civilian population" generally refers to a population that is *predominantly* civilian[143] and stated that a "determination as to whether the population was civilian or not is necessary in respect of every count".[144] The Trial Chamber further noted that the civilian status of the population "may change due to the flow of civilians and combatants".[145]

51. The Appeals Chamber finds no error in the definition of civilian population expounded by the Trial Chamber, which is consistent with the definition provided in Article 50 of Additional Protocol I. Milošević's argument that the Trial Chamber erred in failing to set out the law with respect to civilian population is accordingly rejected.

(ii) "Civilian population" and "civilian areas"

52. Milošević submits that the Chamber erred generally in the factors it took into consideration in determining the civilian status of the population, effectively in failing to consider entire areas,

[141] Trial Judgement, paras 921-924.
[142] *Martić* Appeal Judgement, paras 299, 302. Article 50 of Additional Protocol I reads as follows:
1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4.A.(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.
[143] Trial Judgement, para. 922, referring to Article 50(2) of Additional Protocol I; *Kordić and Čerkez* Appeal Judgement, para. 50; *Galić* Appeal Judgement, para. 144.
[144] Trial Judgement, para. 889.
[145] Trial Judgement, para. 894.

and in particular the ABiH-held territories of Sarajevo, as military zones in which any objective could have been lawfully targeted.[146]

53. The Appeals Chamber recalls that it is well established that the principle of distinction requires parties to distinguish at all times "between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives".[147] There is an absolute prohibition against the targeting of civilians in customary international law,[148] encompassing indiscriminate attacks.[149] As stated in the *Galić* Appeal Judgement,

> […] Article 51(2) of Additional Protocol I "states in a clear language that civilians and the civilian population as such should not be the object of attack", that this principle "does not mention any exceptions", and in particular that it "does not contemplate derogating from this rule by invoking military necessity." […] Article 51(2) "explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities" and "stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives".[150]

54. There is no requirement that particular areas or zones be designated as civilian or military in nature. Rather, a distinction is to be made between the civilian population and combatants, or between civilian and military objectives. Such distinctions must be made on a case-by-case basis. Further, considering the obligations incumbent upon combatants to distinguish and target exclusively military objectives, the Appeals Chamber finds Milošević's argument regarding the proportion of civilians present in areas "replete with military objectives"[151] unpersuasive. In fact, Milošević does not even attempt to argue that the civilian victims in Sarajevo were proportional casualties of lawful military attacks launched by the SRK. A general assertion that the attacks were legitimate because they allegedly targeted "military zones" throughout the city is bound to fail.

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[146] Defence Appeal Brief, para. 31-32.
[147] *Galić* Appeal Judgement, para. 190.
[148] *Galić* Appeal Judgement, para. 190, referring to the *Blaškić* Appeal Judgement, para. 109.
[149] By way of example, the Appeals Chamber recalls Article 51(5)(a) of Additional Protocol I which, although mainly concerned with cases of carpet bombing and similar military activities (ICRC Commentary to Additional Protocols, paras 1979-1981) and not with a protracted campaign of sniping and shelling during a siege-like situation, is undoubtedly instructive of the approach belligerents are required to take in establishing and pursuing military targets.
[150] *Galić* Appeal Judgement, para. 191, referring to the *Galić* Trial Judgement paras 44-45 (footnotes omitted).
[151] See *supra*, Section III.C.1.(a), para. 44.

55. The Appeals Chamber recognizes that some of the language used in paragraphs 896-904 of the Trial Judgement may appear confusing and lead to the conclusion that the Trial Chamber actually accepted Milošević's approach of defining the status of the "areas". However, the Appeals Chamber understands the Trial Judgement to have adopted this terminology for the sole purpose of addressing Milošević's arguments, whereas in reality, the Trial Chamber meant to establish the civilian status of the *population* targeted in specific incidents.[152]

56. In the instant case, the Trial Chamber correctly determined that the population in certain urban areas within the confrontation lines retained its civilian status.[153] Further, the Trial Chamber engaged in a case-by-case analysis of the character of the objective and of the modalities of the attack in order to establish whether the civilian population as such, or individual civilians, were unlawfully targeted in each particular incident. Where that was the case, it was by definition impossible that the target could have been a legitimate military objective. The arguments brought by Milošević fail to demonstrate any error by the Trial Chamber in this regard.

(iii) Individual victims as civilians

57. In the instant case, the crime of terror was charged under Article 3 of the Statute, on the basis of Article 51(2) of Additional Protocol I and, alternatively, Article 13(2) of Additional Protocol II or international customary law.[154] The Appeals Chamber recalls that the protection from attacks afforded to individual civilians by Article 51(2) of Additional Protocol I is suspended pursuant to Article 51(3) of Additional Protocol I when and for such time as they directly participate in hostilities. Accordingly, to establish that the crimes of terror and unlawful attacks against civilians had been committed, the Trial Chamber was required to find beyond reasonable doubt that the victims of individual crimes were civilians *and* that they were not participating directly in the hostilities.[155] The Trial Chamber correctly applied this legal principle in its discussion of the definition of unlawful attacks against civilians, concluding that the specific shelling and sniping incidents that it qualified as crimes of terror were *a fortiori* unlawful attacks against civilians and civilian population.[156] The Appeals Chamber further understands that the Trial

[152] See also *infra*, Section VII.B, paras 139 *et seq.* The Appeals Chamber further notes that Section III.A.3.(a) of the Trial Judgement containing the Trial Chamber's evaluation of the evidence is entitled "Civilian Status of the Population".
[153] Trial Judgement, para. 894-899.
[154] Trial Judgement, para. 873. See also Indictment, para. 28.
[155] *Strugar* Appeal Judgement, paras 172, 187; *Galić* Appeal Judgement, para. 100. See also *Galić* Trial Judgement, paras 47, 48, 132-133.
[156] Trial Judgement, paras 944-947, 953, 875, 882.

Chamber was satisfied that the victims of every incident found to constitute terror were civilians not taking direct part in hostilities.[157]

58. Concerning the status of victims of crimes under Article 5 of the Statute, the Appeals Chamber recalls that "there is nothing in the text of Article 5 of the Statute, or previous authorities of the Appeals Chamber, that requires that individual victims of crimes against humanity be civilians".[158] Nonetheless, it notes that the civilian status of the victims remains relevant for the purpose of the *chapeau* requirement of Article 5 of the Statute as one of the factors to be assessed in determining whether the civilian population was the primary target of an attack.[159] Furthermore, "the fact that a population, under the *chapeau* of Article 5 of the Statute, must be 'civilian' does not imply that such population shall only be comprised of civilians."[160] Accordingly, the civilian status of the victims and the proportion of civilians within a population are factors relevant to satisfy the *chapeau* requirement that an attack was directed against a "civilian population", yet it is not an element of the crimes against humanity that individual victims of the underlying crimes be "civilians".[161]

59. In light of the above, Milošević fails to demonstrate that the Trial Chamber applied an erroneous legal standard in the determination of the civilian status of the victims.

(iv) Presumption of civilian status

60. The Appeals Chamber recalls that where "criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution".[162] In the instant case, Milošević appears to submit that the Trial Chamber reversed this burden when it stated that persons whose status seems doubtful "should be considered to be civilians until further information is available,

[157] The Appeals Chamber notes that the Trial Chamber's findings on the specific incidents only contain references to the civilian status of the victims, and not to their non-participation in the hostilities. However, in light of the fact that the Trial Chamber specifically noted that civilians lose the protection under Article 51 of Additional Protocol I if they take a direct part in hostilities (Trial Judgement, para. 947), the Appeals Chamber considers that the Trial Chamber was in fact satisfied that both criteria were met.
[158] *Martić* Appeal Judgement, para. 307.
[159] *Mrkšić and Šljivančanin* Appeal Judgement, paras 30-31; *Martić* Appeal Judgement, paras 307-308; *Kunarac et al.* Appeal Judgement paras 91-92.
[160] *Mrkšić and Šljivančanin* Appeal Judgement, para. 31.
[161] *Mrkšić and Šljivančanin* Appeal Judgement, para. 32.

and should therefore not be attacked".[163] The Appeals Chamber notes that the relevant statement by the Trial Chamber was made in reference to Article 50(1) of Additional Protocol I and its accompanying Commentary in the context of a discussion of the rules of international humanitarian law governing the conduct of warfare and the selection of targets by military commanders. It did not in any way suggest that the Prosecution did not bear the burden of proof. Furthermore, the Trial Chamber specified that in order to establish the *mens rea* for the offence of unlawful attacks against civilians (and thus for the crime of terror), it must be shown that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In cases of doubt, it held, the Prosecution must show that in the given circumstances, a reasonable person could not have believed that the individual attacked was a combatant.[164] Accordingly, the Appeals Chamber fails to discern any legal error in the Trial Chamber's omission to specify in paragraph 946 of the Trial Judgement that the presumption of the victim's civilian status does not apply in criminal proceedings. Milošević's submission on this point is dismissed.

(c) Conclusion

61. In light of the foregoing, the Appeals Chamber dismisses this sub-ground of appeal, which relates to legal principles identified by the Trial Chamber in its determination of whether the population of Sarajevo retained its civilian status during the Indictment period.

2. Indicia supporting the inference that the SRK attacks were directed against the civilian population

(a) General issues

(i) Arguments of the parties

62. Milošević contends that the Trial Chamber failed to "clearly set out the indicia for assessing whether or not an attack is directed against civilians", and consequently failed to determine beyond reasonable doubt that the attacks were directed against the civilian population.[165] He submits that

[162] *Kordić and Čerkez,* Appeal Judgement, para. 48, referring to *Blaškić* Appeal Judgement, para. 111.
[163] Trial Judgement, para. 946, referring to ICRC Commentary, para. 1920.
[164] Trial Judgement, para. 952.
[165] Defence Appeal Brief, para. 34; Defence Reply Brief, para. 8.

the Trial Chamber ought to have followed the factors laid out in the *Galić* Appeal Judgement, which are discussed below.[166]

63. Before presenting his specific arguments, Milošević first alleges that the Trial Chamber disregarded his arguments and evidence supporting the inference that military activities of the SRK were not directed against the civilian population.[167] Second, Milošević argues that the Trial Chamber erred in law by distorting his arguments and by "stating that the military activities of the ABiH cannot exonerate" him.[168] Third, Milošević contends that the Trial Chamber "completely ignored" certain evidence.[169]

64. The Prosecution responds that the Trial Chamber carefully assessed all the evidence and properly concluded that the SRK carried out attacks against the civilian population.[170] The Trial Chamber, it argues, examined each of the alleged sniping and shelling incidents and determined beyond reasonable doubt that the SRK attacks in Sarajevo were directed against the civilian population.[171] Accordingly, the Prosecution submits that the Trial Chamber correctly identified and applied the relevant law and that its findings were both reasonable and grounded in the evidence.[172]

65. The Prosecution avers that Milošević failed to identify any specific arguments that the Trial Chamber ignored, and that the Trial Chamber assessed all relevant arguments at length.[173] It further submits that Milošević misinterpreted the Trial Judgement, which did not deny that ABiH military activities could be considered in determining the object of the SRK attacks, but found that the ABiH actions were not sufficiently linked to the criminal liability of Milošević.[174] Finally, the Prosecution contends that Milošević failed to link the invoked evidence to the particular incidents of sniping or shelling or to show why the Trial Chamber's findings that the SRK attacks were directed against the civilian population were unreasonable.[175]

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[166] Defence Appeal Brief, para. 33, referring to *Galić* Appeals Judgement, para. 132, which refers to *Kunarac et al.* Appeal Judgement, para. 91 and *Blaškić* Appeal Judgement, para. 106.
[167] Defence Appeal Brief, para. 34.
[168] Defence Appeal Brief, para. 34.
[169] Defence Appeal Brief, para. 35.
[170] Prosecution Response Brief, para. 18.
[171] Prosecution Response Brief, para. 33, referring to Trial Judgement, Section II.E. and paras 905-913, 924, 953.
[172] Prosecution Response Brief, paras 33, 35.
[173] Prosecution Response Brief, para. 34.

(ii) Analysis

66. The Appeals Chamber recalls that

> [t]he intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack *particular* civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.[176]

It further recalls that "the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population".[177]

67. The Appeals Chamber emphasizes that the said list of factors to be taken into account in such determination is a non-exhaustive set of criteria that must be assessed on a case-by-case basis. Consequently, Milošević's unsubstantiated contention that the Trial Chamber omitted to consider explicitly one of these factors is not in itself sufficient to prove an error of law.

68. The Appeals Chamber recognises that the Trial Chamber did not address each factor separately, in the manner presented by the Defence Appeal Brief. While it may have been desirable for the Trial Chamber to identify which specific factors it deemed relevant to the case and which specific evidence it used to establish each of them, the Appeals Chamber considers that the Trial Chamber dealt with the evidence pertinent to each of these factors in its thorough analysis in

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[174] Prosecution Response Brief, para. 36.
[175] Prosecution Response Brief, para. 37.
[176] *Strugar* Appeal Judgement, para. 271 (footnotes omitted), referring to *Galić* Appeal Judgement, fns 707, 709 and paras 132-133, and *Kordić and Čerkez* Appeal Judgement, para. 438. The Appeals Chamber further notes that among other relevant factors are the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war and the indiscriminate nature of the weapons used (*Galić* Appeal Judgement, para. 132; *Kunarac et al.* Appeal Judgement, para. 91, *Blaškić* Appeal Judgement, para. 106).
[177] *Strugar* Appeal Judgement, para. 275, referring to *Galić* Appeal Judgement, para. 132 and fns 101, 706.

Section II.E of the Trial Judgement.[178] Accordingly, Milošević has not demonstrated that the Trial Chamber's reasoning is deficient as a whole.

69. Regarding Milošević's second general argument, the Appeals Chamber recalls that as a matter of law, the prohibition against attacking civilians is absolute and that "[o]ne side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all of its obligations".[179] The Trial Chamber consistently adhered to these fundamental principles throughout the Trial Judgement. No error in this approach has been demonstrated and the respective submission thus stands to be rejected.

70. Finally, with respect to Milošević's third general allegation that the Trial Chamber disregarded his arguments and "completely ignored" certain evidence at trial,[180] the Appeals Chamber considers that he failed to identify the relevant paragraphs of the Trial Judgement and the items of evidence that were, in his view, disregarded. The Appeals Chamber is therefore bound to reject the submission.[181]

71. The Appeals Chamber will now consider the arguments of the parties related to each of the five factors that Milošević considers relevant.

(b) Means and methods used in the course of the attack

72. Milošević first points to evidence of the SRK's capacity noting that it never consisted of more than 18,000 soldiers[182] and had limited technical means to wage war due to equipment deficiencies.[183] Milošević contends that on this basis it can be reasonably inferred that the attacks carried out by the SRK were not directed against the civilian population.[184]

[178] Trial Judgement, paras 192-799.
[179] *Martić* Appeal Judgement, para. 270, referring to ICRC Commentary to Additional Protocols, paras 47 *et seq.* See also *Martić* Appeal Judgement, para 268, referring to *Strugar* Appeal Judgement, para. 275.
[180] Defence Appeal Brief, paras 34-35.
[181] See *supra*, Section II, paras 16, 17(ix), 17(x).
[182] Defence Appeal Brief, paras 36-37.
[183] Defence Appeal Brief, para. 39; AT. 46-47.
[184] Defence Appeal Brief, para. 35.

73. The Prosecution notes that the Trial Chamber considered such evidence.[185] It argues that Milošević fails to show how the Trial Chamber erred in assessing the evidence on this issue, or how the evidence demonstrates that the SRK attacks were not directed against civilians.[186]

74. The Appeals Chamber notes that the Trial Chamber was adequately informed of the weakness of the SRK forces relative to the ABiH.[187] It therefore must be presumed that it took this into account when reaching its findings. Moreover, Milošević's suggested conclusion on this point does not necessarily flow from the argumentation, because the fact that the SRK forces may have been weaker than the ABiH is not relevant to the conclusion as to whether the SRK attacks were directed against the civilian population. Accordingly, this argument is rejected.

(c) Compliance or attempted compliance with the laws of war

75. Milošević argues that he "called on" his soldiers to "take action against military objectives only, as and when it was necessary for the protection of their lives and families".[188] He argues that his soldiers followed his instructions. He further submits that he warned his soldiers to take the necessary precautions when they knew civilians could be mixed with the ABiH military objectives and had posted the Geneva conventions in the SRK headquarters.[189]

76. The Prosecution contends that the Trial Chamber considered this argument and was not convinced that this raised any reasonable doubt as to Milošević's culpability.[190] It adds that Milošević simply repeats his trial arguments and fails to demonstrate any error.[191]

77. The Appeals Chamber notes that the Trial Chamber explicitly stated that it "does not disregard the evidence that the Accused, on certain occasions, instructed his soldiers to abide by the Geneva Conventions and not to shoot civilians".[192] Nonetheless, on the totality of the evidence, it concluded that the campaign of shelling and sniping had "a design, a consistency and a pattern that is only explicable on the basis of a system characterised by a tight command and control."[193] The

[185] Prosecution Response Brief, para. 38, referring to Trial Judgement, paras 66-110.
[186] Prosecution Response Brief, para. 38.
[187] Trial Judgment, paras 66-110.
[188] Defence Appeal Brief, para. 41.
[189] Defence Appeal Brief, para. 41.
[190] Prosecution Response Brief, para. 39, referring to Trial Judgement, paras 837-840 and 965-966.
[191] Prosecution Response Brief, para. 39.
[192] Trial Judgement, para. 966.
[193] Trial Judgement, para. 966.

Appeals Chamber will address Milošević's arguments relevant to this conclusion under the analysis of his fifth and twelfth grounds of appeal.

(d) Resistance to the assailants at the time

(i) Arguments of the parties

78. Milošević argues that the Trial Chamber failed to note that the SRK was resisting ABiH offensives and emphasizes that ABiH troops were posted throughout Sarajevo.[194] He addresses five specific issues in this regard.

79. First, Milošević notes that the ABiH was significantly larger than the SRK[195] and that the HVO, Bosnian MUP and "El Mudžahedin" units fought alongside the ABiH.[196] Furthermore, he contends that the ABiH had at its disposal extensive amounts of weaponry, including aerial bombs, and had the capability of manufacturing or repairing all types of weapons and ammunition. Milošević asserts that in their military activities, ABiH employed weapons previously placed under UNPROFOR control, received weaponry despite the arms embargo, and were supported, equipped, and trained by the United States.[197]

80. Second, Milošević contends that objects "which by their nature or location made an effective contribution to the military action of ABiH" were placed in various zones of Sarajevo:[198] mortar fire and weapons manufacturing took place in and around Hrasnica, Sokolović Kolonija and Igman and the arterial roads therein were used by the ABiH;[199] the Dobrinja-Butmir tunnel was used to transport ABiH personnel and weapons;[200] snipers and artillery were posted in Dobrinja, Mojmilo, Alipašino Polje and Vojničko Polje, and soldiers lived there;[201] weapons were held in Stup and Stupska Petlja;[202] ABiH members took up positions on the hills surrounding Sarajevo at Sokolje, Briješko Brdo, Žuć, Hum, Valešiči, and Pofalići;[203] ABiH heavy weapons operated from

[194] Defence Appeal Brief, paras 42-43.
[195] Defence Appeal Brief, para. 44.
[196] Defence Appeal Brief, paras 45-47.
[197] Defence Appeal Brief, paras 48-49.
[198] Defence Appeal Brief, para. 50 (emphasis omitted); AT. 48-51, 54-58, 60-62, 64.
[199] Defence Appeal Brief, paras 51-57.
[200] Defence Appeal Brief, paras 58-59.
[201] Defence Appeal Brief, paras 60-62.
[202] Defence Appeal Brief, paras 63-64.
[203] Defence Appeal Brief, paras 65-67.

the PTT and RTV buildings;[204] soldiers and weapons operated in the Pavle Goranin neighbourhood and the Viktor Bubanj barracks;[205] the Parliament, UNIS, the Holiday Inn Hotel, the Government, the Faculty of Mathematics and the former Marshal Tito barracks were used as ABiH combat positions in Marin Dvor and Vrbanja Most;[206] the Jewish Cemetery was under shared control by the two opposing forces;[207] the ABiH held combat positions in Bistrik, Trebević, Debelo Brdo, Čolina Kapa and Brajkovac;[208] soldiers operated at Sedrenik and the area contained military objectives;[209] and in the Koševo area, the ABiH held combat positions in buildings which were intended to accommodate civilians in peacetime.[210]

81. Third, Milošević emphasizes that the ABiH strategically positioned mortars amongst civilians in order to make retaliation difficult.[211]

82. Fourth, Milošević details a chronology of action by the ABiH to demonstrate the continuing nature of the conflict between the two opposing armies notwithstanding variations in intensity.[212] In the latter half of 1994, the ABiH continuously violated the demilitarised zone.[213] Milošević alleges that UNPROFOR sent a report to the then UN Secretary-General Kofi Annan only mentioning SRK attacks.[214] In the following months, fighting continued in the "habitual combat zones" according to Milošević.[215] He notes that in April 1995, the fighting intensified and that by June the ABiH was engaging in a large-scale offensive.[216] Following the NATO air strikes on SRK-held territory, the ABiH engaged in military activities synchronised with those of UNPROFOR until the SRK capitulated in September 1995.[217]

[204] Defence Appeal Brief, para. 68.
[205] Defence Appeal Brief, para. 69.
[206] Defence Appeal Brief, para. 70.
[207] Defence Appeal Brief, para. 71.
[208] Defence Appeal Brief, paras 72-74.
[209] Defence Appeal Brief, paras 75-77.
[210] Defence Appeal Brief, paras 78-80.
[211] Defence Appeal Brief, para. 81.
[212] Defence Appeal Brief, paras 82-98.
[213] Defence Appeal Brief, para. 84.
[214] Defence Appeal Brief, para. 85.
[215] Defence Appeal Brief, para. 86.
[216] Defence Appeal Brief, para. 87.
[217] Defence Appeal Brief, para. 98.

83. Finally, Milošević contends that the ABiH attacks claimed many victims in SRK-held territory.[218]

84. The Prosecution generally responds that Milošević simply repeats his trial arguments.[219] It contends that Milošević fails to (i) address the evidence relied on by the Trial Chamber; (ii) show why no reasonable trier of fact could have come to the Trial Chamber's conclusions; and (iii) show how the error allegedly committed by the Trial Chamber invalidates his convictions.[220] The Prosecution also asserts that Milošević fails to demonstrate that the targets of the specific sniping and shelling incidents were military objectives.[221] The Prosecution deals with each of Milošević's specific contentions in turn.

85. First, the Prosecution notes that the Trial Chamber considered evidence as to the units and equipment on both sides of the conflict and rejected Milošević's arguments that the Bosnian police formed part of the ABiH and that the ABiH possessed air bombs.[222] Second, the Prosecution contends that Milošević merely repeats the arguments he made at trial about areas of Sarajevo amounting to legitimate targets by virtue of the military objectives within them and suggests that this argument is insufficient to invalidate the Trial Chamber's conclusion that SRK attacks targeted civilians.[223] Third, the Prosecution submits that the Trial Chamber did consider evidence about the movement of ABiH weapons throughout the city.[224] The Prosecution further argues that the Trial Chamber examined whether there were legitimate targets proximate to each incident and that Milošević has failed to show any error on the part of the Trial Chamber.[225] Fourth, the Prosecution contends that Milošević has not shown how the evidence of ABiH military activity in 1994 and 1995 demonstrates that the Trial Chamber was unreasonable in finding that a civilian population was targeted by the SRK.[226] Finally, the Prosecution notes that the Trial Chamber correctly considered Milošević's allegation that ABiH attacks resulted in victims in SRK-held territory to be irrelevant in determining whether SRK attacks were directed at the civilian population.[227]

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[218] Defence Appeal Brief, para. 99.
[219] Prosecution Response Brief, para. 40.
[220] Prosecution Response Brief, para. 41.
[221] Prosecution Response Brief, para. 46.
[222] Prosecution Response Brief, para. 41, referring to Trial Judgement, paras 66-110, 188-190, 103-108.
[223] Prosecution Response Brief, para. 42.
[224] Prosecution Response Brief, para. 43, referring to Trial Judgement, para. 583.
[225] Prosecution Response Brief, para. 43.
[226] Prosecution Response Brief, para. 44.
[227] Prosecution Response Brief, para. 45.

(ii) Analysis

86. The Appeals Chamber finds that the Trial Chamber gave sufficient consideration to Milošević's submissions at trial in relation to the size of the ABiH forces relative to the SRK ones,[228] the military objectives in Sarajevo,[229] the intermingling of ABiH with civilians,[230] the varying intensity of the conflict,[231] and the fact that ABiH military activities caused casualties.[232] The Appeals Chamber further recalls that it has already dismissed Milošević's general submission that the military targets within the confrontation lines converted all ABiH-held areas of Sarajevo into legitimate objectives.[233] Moreover, Milošević fails to link the evidence on ABiH military objectives to any of the specific shelling or sniping incidents considered by the Trial Chamber and fails to demonstrate how the Trial Chamber erred in its evaluation of the evidence.[234]

87. Concerning Milošević's specific submission that the BiH MUP forces fought alongside the ABiH,[235] the Appeals Chamber notes the Trial Chamber's conclusion that "[t]he evidence does not support a finding that the regular police was an integral part of the ABiH troops, nor does it support a finding that the regular police assisted in combat operations during ABiH offensives."[236] However, the Appeals Chamber also notes that witness Karavelić testified that pursuant to an agreement between the commander of the General Staff and the Minister of Police, local police units were at times assigned for certain combat actions.[237] A number of orders by Vahid Karavelić and Fikret Prevljak instructing coordinated action of ABiH troops and MUP forces were also presented at trial.[238] In light of this evidence, the Appeals Chamber finds that the Trial Chamber committed an error of law as no reasonable trier of fact could conclude on that basis that the MUP forces did not assist the ABiH troops in conducting combat operations. That said, the evidence on

[228] Trial Judgement, paras 66-110.
[229] Trial Judgement, paras 889-904.
[230] Trial Judgement, paras 892-893.
[231] See, generally, Trial Judgement, paras 46-65, 141-173.
[232] Trial Judgement, para. 798.
[233] See *supra*, Section III.C.1.(b)(ii). See also *infra*, Section VII.B., paras 139 *et seq.*
[234] The Appeals Chamber notes that in three instances Milošević discusses individual military objectives: Dobrinja-Butmir Tunnel (Defence Appeal Brief, paras 58-59), the PTT/RTV building (Defence Appeal Brief, para. 68) and the Koševo hospital (Defence Appeal Brief, para. 78). However, even in those instances, he neither refers to a particular shelling incident nor explains why the Trial Chamber should have given more weight to the existence of these military objectives when concluding that civilian population was targeted in the attacks.
[235] Defence Appeal Brief, para. 45; AT. 44-46.
[236] Trial Judgement, para. 190.
[237] Trial Judgement, para. 188, referring to Vahid Karavelić, 28 Mar 2007, T. 4159.
[238] Exhibits D61; D62, p. 1; D143; D190, pp. 1, 3, 6; D417, p. 2; D426, p. 2; D282, p. 2.

the record does not support Milošević's submission that the "MUP had *permanently* been engaged in military actions and providing support to military operations."[239] Nor does it support Milošević's argument that MUP formed part of the ABiH forces.[240] The evidence clearly shows that the cooperation of the local police units with regard to combat actions was engaged on an incidental basis while the units remained under the control of the BiH Ministry of Interior.[241] In light of the foregoing, and considering that the Trial Chamber correctly engaged in a case-by-case analysis of the modalities and the objectives of the attacks in order to establish whether the civilian population was targeted in each particular incident, Milošević's argument that the Trial Chamber should have taken into account the "full strength" of the police forces when assessing the status of the population in Sarajevo[242] is rejected.

(e) The status and number of victims of the attacks carried out by the SRK

(i) Arguments of the parties

88. Milošević contends that the Trial Chamber failed to determine beyond reasonable doubt the number of victims of SRK attacks and their civilian status. Consequently, he argues, the Trial Chamber erred in law by concluding that civilians were killed or seriously injured as a result of sniping and shelling.[243]

89. First, Milošević alleges that the Bosnian police reports do not establish a causal link between the SRK attacks and the alleged victims or their civilian status,[244] and that the demographics expert report fails to distinguish victims by the territory in which they were hit.[245] Milošević contends that the fact that on certain occasions persons in the ABiH-held part of Sarajevo were injured or killed by ABiH sniper fire and shells creates reasonable doubt about the Trial Chamber's conclusion that attacks against civilians were primarily carried out by the SRK.[246] To support this contention, Milošević notes evidence of ABiH units firing on Zetra stadium; the diary of a UN officer posted in Sarajevo in 1995; reports of international representatives; and the

[239] AT. 45 (emphasis added).
[240] Defence Appeal Brief, para. 45.
[241] Exhibit P492, pp. 14-15; Vahid Karavelić, 28 Mar 2007, T. 4159.
[242] AT. 45-46. The Appeals Chamber further notes that Milošević's allegation with respect to the HVO and "El Mudžahedin" units fighting alongside the ABiH is not supported by any evidence that he refers to.
[243] Defence Appeal Brief, para. 100, referring to Trial Judgement, paras 794 and 796.
[244] Defence Appeal Brief, para. 101, referring to Exhibits P602 and P637.
[245] Defence Appeal Brief, para. 101, referring to W132, 2 May 2007, T. 5526-5534.
[246] Defence Appeal Brief, paras 102-104.

testimony of witnesses, particularly witness Harland and witness Nicolai.[247] Milošević argues that a reasonable Trial Chamber should have concluded that persons in the ABiH-held parts of Sarajevo were injured and killed by ABiH sniper fire and shelling. In his view, the Trial Chamber should have used this as a factor in determining whether the SRK attacks were directed against the civilian population.[248]

90. Second, Milošević argues that the Trial Chamber erred in law by failing to establish a "cause-effect relationship" between the victims and the SRK attacks.[249] In this respect, he notes that the investigations were concurrently conducted by multiple organisations and the investigating judge was not "systematically" present when the police arrived; UNMOs had inadequate access to morgues and hospitals; UNPROFOR had allegedly cleaned up the site of an incident prior to the arrival of the police; NGOs intervened on the sites; reports of the local police, who were the first to arrive at the scene, were never tendered into evidence; scenes were cleaned up and bodies were removed prior to the arrival of the Security Services Centre police; and investigation teams failed to take photographs of alleged victims or traces of blood as well as samples of biological material.[250] Accordingly, Milošević submits, it is impossible to establish beyond reasonable doubt that the SRK was responsible for the alleged deaths.[251]

91. Third, Milošević contends that the Trial Chamber failed to establish beyond reasonable doubt the civilian status of the victims. He suggests that in order to determine the status of the victims, UNPROFOR used information provided by the ABiH, which, as a party to the conflict, had an interest in presenting the victims as civilians.[252] Furthermore, there was sufficient confusion as to who was a member of the armed forces at the time to cast reasonable doubt on the civilian status of the victims recognised by the Trial Chamber.[253] Milošević alleges that "no evidence […] substantiate[s]" the conclusions on the civilian status of a number of victims, namely: Jasmina Tabaković, Alma Ćutuna, Hajrudin Hamidić, Sabina Šabanić, Afeza Karačić, Alija Holjan, Alma Mulaosmanović, Azem Agović, Alen Gičević, Tarik Žunić, and Adnan Kasapović.[254] He also

[247] Defence Appeal Brief, paras 105-112.
[248] Defence Appeal Brief, para. 115; AT. pp. 67-71.
[249] Defence Appeal Brief, para. 116; Defence Reply Brief, para. 8.
[250] Defence Appeal Brief, paras 116-121.
[251] Defence Appeal Brief, para. 122.
[252] Defence Appeal Brief, para. 125.
[253] Defence Appeal Brief, paras 123-126.
[254] Defence Appeal Brief, para. 128, referring to Trial Judgement, paras 250, 266 (Milošević refers to Alma Cutina, but the Appeals Chamber understands this reference to be to Alma Ćutuna), 276, 289, 308, 322, 378, 393.

challenges several of the Trial Chamber findings, including those regarding the shelling incident at the Markale Market on 28 August 1995, with respect to the number of victims and their civilian status,[255] and in relation to the Trial Chamber's acceptance of evidence from different sources.[256]

92. The Prosecution first responds that the Trial Chamber determined beyond reasonable doubt the number and status of victims in each alleged SRK attack. It argues that Milošević focused on the summary of the Trial Chamber's findings[257] and reiterates arguments that were considered in the Trial Judgement.[258] The Prosecution notes that Milošević raised his concerns about the reliability of Bosnian police reports and expert evidence at trial, and that he simply reiterates his arguments without showing how the Trial Chamber erred.[259] Similarly, it argues that the Trial Chamber considered allegations that some of the sniping and shelling was carried out by the ABiH. In its view, Milošević has not addressed the evidence relied on by the Trial Chamber in support of its findings and accordingly failed to demonstrate that the Trial Chamber's findings were unreasonable.[260]

93. Second, the Prosecution notes that Milošević's arguments as to causation allege errors of fact and submits that they should be rejected as they were already considered at trial. Milošević refers only to general evidence without showing that specific evidence relied on by the Trial Chamber was unsatisfactory.[261] The Prosecution notes that the Trial Chamber found "shortcomings in some of the procedures adopted by the BiH police investigation teams" but it was satisfied about the general reliability of their reports.[262] It further suggests that Milošević has distorted the Trial Chamber's findings in relation to the evidence of Fikreta Pačariz and has merely repeated arguments made at trial about the number of victims of the Markale Market incident.[263]

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[255] Defence Appeal Brief, para. 128, referring to Trial Judgement, paras 443, 493, 507, 532, 538, 551, 560, 619, 620, 639, 651 and 668. The Appeals Chamber notes that Milošević claims that no evidence supports the Trial Chamber's findings in paragraph 620 of the Judgement as to the number and civilian status of the victims. However, paragraph 620 of the Trial Judgement contains no such findings. Considering that Milošević's reference to the Trial Judgement is incorrect, the Appeals Chamber dismisses his argument without detailed consideration.
[256] Defence Appeal Brief, para. 128, referring to Trial Judgement, paras 630 and 721.
[257] Prosecution Response Brief, para. 47, referring to Trial Judgement, paras 794 and 796.
[258] Prosecution Response Brief, paras 47-48.
[259] Prosecution Response Brief, para. 47, referring to Trial Judgement, paras 174-191, 739.
[260] Prosecution Response Brief, para. 48.
[261] Prosecution Response Brief, para. 49
[262] Prosecution Response Brief, para. 50, referring to Trial Judgement, para. 189.
[263] Prosecution Response Brief, para. 51, referring to Trial Judgement, paras 639, 697.

94. Third, the Prosecution responds that the Trial Chamber made a reasonable determination based on the evidence about the status of victims of the SRK attacks.[264] The Prosecution notes that for the *actus reus* of the crime of terror and the *chapeau* requirement for crimes against humanity, the Trial Chamber was only required to find that SRK attacks or threats thereof were directed against the civilian population.[265] It notes that the Trial Chamber went further than strictly required by finding that each incident of sniping and shelling caused death or serious injury to civilians. The Prosecution sets out the findings of the Trial Chamber with regard to the individual victims and the evidence on which the Trial Chamber relied.[266] It contends that Milošević ignores this evidence and that his assertion under this head should be rejected.[267] The Prosecution further argues that Milošević has not demonstrated how the Trial Chamber erred in relation to the UNPROFOR reports on the civilian status of the victims, the makeup of the ABiH, and the appearance and clothing of ABiH soldiers.[268]

(ii) Analysis

95. As a preliminary finding, the Appeals Chamber considers that the Trial Chamber gave adequate attention to a number of issues raised by Milošević under this sub-ground of appeal, notably: the credibility of the police reports and expert testimony;[269] the allegations that some of the sniping and shelling was carried out by the ABiH;[270] the alleged shortcomings of the BiH investigations;[271] and the fact that members of ABiH not wearing uniforms were allegedly interspersed with non-combatants.[272] Milošević has failed to demonstrate how the Trial Chamber erred in its evaluation. Accordingly, the Appeals Chamber declines to consider Milošević's respective challenges with regard to the "cause-effect relationship" between the victims and the SRK attacks.

96. Regarding Milošević's general argument that the Trial Chamber failed to determine beyond reasonable doubt the number of people who were victims of SRK attacks and their civilian status, the Appeals Chamber reiterates that for the *chapeau* requirement of crimes against humanity, the

[264] Prosecution Response Brief, para. 52.
[265] Prosecution Response Brief, paras 52-56.
[266] Prosecution Response Brief, paras 56-57.
[267] Prosecution Response Brief, para. 58.
[268] Prosecution Response Brief, paras 59-60.
[269] Trial Judgement, paras 174-191.
[270] Trial Judgement, paras 237-243 and 433-438.
[271] Trial Judgement, para. 189.
[272] Trial Judgement, paras 892 -904.

Trial Chamber was only required to find that SRK attacks or threats of attacks were *directed* against the civilian population. The Trial Chamber was not required to find that all the victims of individual crimes, in the instant case murder and inhumane acts, were civilians.[273] However, the Appeals Chamber notes that Milošević was also convicted for ordering acts of terror against the civilian population by means of killing and injuring civilians. Accordingly, and as explained above, the Trial Chamber was required to make a finding as to the civilian status of the victims and their non-participation in hostilities with regard to each shelling and sniping incident underpinning Milošević's conviction for the crime of terror.[274]

97. The Appeals Chamber notes, however, that in challenging the civilian status of a number of victims of sniping and shelling incidents, Milošević merely asserts that no evidence substantiates the Trial Chamber's findings.[275] He fails to address any of the evidence considered by the Trial Chamber or to point at evidence showing that the relevant findings in the Trial Judgement were erroneous. Such bare assertions fail to meet the burden on appeal and thus warrant summary dismissal.[276] Accordingly, the Appeals Chamber dismisses without detailed consideration Milošević's challenges to paragraphs 250, 266, 276, 289, 308, 322, 378, 393, 443, 493, 507, 532, 538, 551, 560, 619, 639, 651 and 668 of the Trial Judgement. Furthermore, in light of its findings under Section XI.B.2 below, the Appeals Chamber considers that the arguments regarding the status of the victims of the Markale Market shelling are moot for the purposes of the present Judgement.

98. Consequently, the only allegation that remains to be addressed is Milošević's claim that the Trial Chamber accepted as proven the opinion of witness Pačariz as to the cause of death of her husband, even though she was a factual witness.[277] However, the Appeals Chamber notes that the ultimate finding of the Trial Chamber concerning the shelling of Bunički Potok Street on 1 July 1995 pertains to 13 civilians who were injured as a result of the explosion.[278] The Trial Chamber did not find Milošević responsible for the death of Duran Pačariz. Accordingly, the Appeals Chamber considers Milošević's submission as referring to a factual finding on which neither his

[273] See *supra,* Section III.C.1.(b)(iii), para. 58.
[274] See *supra,* Section III.C.1.(b)(iii), para. 57.
[275] Defence Appeal Brief, para. 128.
[276] See *supra*, Section II, para. 17.
[277] Defence Appeal Brief, para. 128, referring to Trial Judgement, para. 630.
[278] Trial Judgement, para. 639.

conviction nor his sentence rely and therefore dismisses his argument without further consideration.[279]

(f) Discriminatory nature of the SRK attacks

99. Finally, Milošević contends that the attacks carried out by the SRK under his command were "combat activities within military installations".[280] Accordingly, he submits that the Trial Chamber failed to establish beyond reasonable doubt that civilians were "potential victims" and that the attacks were indiscriminate in nature.[281]

100. The Prosecution argues that Milošević's submission is "a bare assertion" and that he fails to demonstrate how the Trial Chamber erred in finding that the attacks were directed against the civilian population.[282]

101. The Appeals Chamber considers that Milošević has not substantiated his assertion that the attacks carried out by the SRK under his command were "combat activities within military installations".[283] The Appeals Chamber is unable to discern the particular finding of fact by the Trial Chamber that Milošević contests as he refers only to his own analysis of the evidence on the record.[284] It recalls in this respect that where an appellant merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber without attempting to demonstrate any specific error, his submission is to be summarily dismissed.[285] Milošević's argument is accordingly dismissed without further consideration.

(g) Conclusion

102. In light of the foregoing, the Appeals Chamber dismisses this sub-ground of appeal in its entirety.

[279] See *supra*, Section II, para. 17(iii).
[280] Defence Appeal Brief, para. 129.
[281] Defence Appeal Brief, para. 129.
[282] Prosecution Response Brief, para. 61.
[283] Defence Appeal Brief, para. 129.
[284] Defence Appeal Brief, para. 129, referring to paras 42-99 of the Defence Appeal Brief. See also *id.*, para. 35.
[285] See *supra,* Section II, para. 17 (iv).

D. Crimes against humanity

1. Nexus between the acts of the perpetrator and the attacks

103. Milošević challenges the Trial Chamber's finding in paragraph 920 that the requisite nexus between his acts and the attacks carried out against civilians has been established.[286] While he supports the legal standard set out by the Trial Chamber,[287] Milošević claims that it was unreasonable for the Trial Chamber to conclude that the requisite nexus existed in this case because it failed to establish that the attacks in question were directed against civilians.[288]

104. The Prosecution submits that this argument must fail because Milošević has not shown that the Trial Chamber erred in concluding that SRK attacks were directed against the civilian population.[289]

105. The Appeals Chamber recalls that it found no error in the Trial Chamber's approach to the determination of whether the SRK attacks were directed against civilians.[290] The Appeals Chamber notes Milošević's submission that there was reasonable doubt as to the nexus between himself and the SRK, but fails to discern any specific error alleged to have been committed by the Trial Chamber on that basis. Under this sub-ground of appeal, Milošević simply repeats his previous arguments about the failure to establish that the attacks carried out were directed against civilians.

2. Murder and inhumane acts

106. Milošević contends that the Trial Chamber failed to establish the material elements underlying the crimes of murder and inhumane acts as it did not establish beyond reasonable doubt the causal link between the death or serious injuries of the victims in specific incidents and the attacks carried out by the SRK.[291] Further, Milošević contends that the Trial Chamber failed to establish the SRK's intent to cause the said injuries.[292]

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[286] Defence Appeal Brief, paras 141-142.
[287] Trial Judgement, paras 918-919.
[288] Defence Appeal Brief, para. 142.
[289] Prosecution Response Brief, paras 68-70.
[290] See *supra*, Section III.C.2.
[291] Defence Appeal Brief, paras 144-145.
[292] Defence Appeal Brief, para. 145.

107. In response, the Prosecution reiterates the findings by the Trial Chamber that SRK attacks led to civilian casualties and that this was the intended effect and, therefore, supports the conviction of Milošević for murder and inhumane acts as crimes against humanity.[293]

108. The Appeals Chamber recalls that the Trial Chamber correctly articulated the elements of the crime of murder as follows:

> For the crime of murder to be established, it must be shown that a victim died and that the victim's death was caused by an act or omission. To satisfy the *mens rea* for murder it is further required that there was an act or omission, with the intention to kill (*animus necandi*) or to inflict grievous bodily harm, in the reasonable knowledge that it might lead to death.[294]

Further, the Trial Chamber defined the elements of the crime of other inhumane acts:

> (i) there was an act or omission of similar seriousness to the other acts enumerated in Article 5; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed intentionally.[295]

109. The Appeals Chamber understands that Milošević is not contesting the elements of the crimes of murder and inhumane acts as enunciated by the Trial Chamber. Concerning the alleged errors of fact, the Appeals Chamber notes that in support of his contention Milošević makes extensive reference to other portions of his Defence Appeal Brief, notably to his seventh to eleventh grounds of appeal.[296] Accordingly, the Appeals Chamber will address any alleged error of fact concerning the causal link between the death or serious injury of the victims and the attacks carried out by the SRK as well as the SRK's intent in this regard, if and when properly raised under Milošević's subsequent grounds of appeal.

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[293] Prosecution Response Brief, para. 70.
[294] Trial Judgement, para. 931 (footnotes omitted), referring to *Galić* Appeal Judgement, paras 147-149; *Kvočka et al.*, Appeal Judgement, para. 261.
[295] Trial Judgement, para. 934 (footnotes omitted).
[296] Defence Appeal Brief, paras 144, 145, referring to paras 170-317 of the Defence Appeal Brief.

E. Conclusion

110. For the reasons above, Milošević's first ground of appeal is dismissed in its entirety. Milošević's challenges to paragraphs 138, 139 and 751 of the Trial Judgement pleaded under this ground of appeal will be addressed in the context of the third sub-ground of his fourth ground of appeal below.[297]

[297] See *infra,* Section VI.C.2.

IV. FINDINGS ALLEGEDLY NOT SUPPORTED BY EVIDENCE (MILOŠEVIĆ'S SECOND GROUND OF APPEAL)

A. Arguments of the parties

111. Under his second ground of appeal, Milošević argues that the Trial Chamber erroneously established certain facts by relying on evidence it had not admitted during the proceedings, thus violating Rule 89 of the Rules. Consequently, he requests the Appeals Chamber to disregard the affected conclusions.[298] To illustrate this general allegation Milošević presents three specific arguments which will be dealt with in turn.

112. First, Milošević submits that the Trial Chamber erroneously relied on Exhibit D362 to establish the visibility on the days when the following sniping incidents took place: the sniping of Alma Ćutuna on 8 October 1994, the sniping of Adnan Kasapović on 24 October 1994, and the sniping of Azem Agović and Alen Gičević on 3 March 1995.[299] Specifically, Milošević argues that Exhibit D362 contains no information on visibility and that the information relied upon by the Trial Chamber was actually obtained from the Prosecution and as such was not part of the evidence.[300] Second, Milošević contends that the Trial Chamber erred in finding that the purpose of the siege of Sarajevo was to compel the BiH Government to capitulate, as, in his view, such a conclusion was not supported by the evidence.[301] Finally, he submits that the Trial Chamber erred in paragraphs 910, 993, and 1001 of the Trial Judgement by giving "its own testimony about the psychological consequences of military activities on the civilian population."[302] He argues that the psychological state of the civilian population could not have been established without having recourse to an expert in psychology.[303]

113. The Prosecution responds that Exhibit D362 includes information about visibility in metres under the heading "VSBY (M)". It therefore argues that it was reasonable for the Trial Chamber to rely on it in order to conclude that the visibility was sufficient for a sniper to identify the victim in

[298] Defence Appeal Brief, paras 146-149.
[299] Defence Appeal Brief, para. 146, referring to Trial Judgement, paras 265, 323 and 396; Defence Reply Brief, para. 9.
[300] Defence Appeal Brief, para. 146, referring to Ivan Stamenov, 22 Aug 2007, T. 9064, 9067.
[301] Defence Appeal Brief, para. 147, referring to Trial Judgement, para. 751; Defence Reply Brief, para. 9.
[302] Defence Appeal Brief, para. 148.
[303] Defence Reply Brief, para. 9.

the three incidents challenged by Milošević.[304] Further, the Prosecution asserts that Milošević already advanced this argument at trial and the Trial Chamber implicitly rejected it.[305] Second, the Prosecution argues that the Trial Chamber's finding on the purpose of the siege of Sarajevo is immaterial to Milošević's conviction and is therefore irrelevant.[306] Nonetheless, the Prosecution submits that the finding in question is in fact based on the evidence, such as that discussed in paragraph 753 of the Trial Judgement.[307] Finally, concerning the psychological impact of the military activities on the civilian population, the Prosecution refers to section II.E.7.(c) of the Trial Judgement where the Trial Chamber discussed the evidence it relied upon in reaching its conclusion. It asserts that in referring to paragraphs 910, 993,[308] and 1001 of the Trial Judgement, Milošević fails to recognise that the Trial Chamber had previously stated that in making its findings on Milošević's responsibility, it would not repeat the evidence that had already been set out *in extenso*.[309]

B. Analysis

114. The Appeals Chamber notes that the first page of Exhibit D362 contains a legend explaining the abbreviations used in the subsequent pages of the NATO weather report for Sarajevo concerning the period from 8 October 1994 to 28 August 1995. However, the legend does not explain the meaning of the heading "VSBY (M)" mentioned in column 8 of the report. When asked to comment on it, witness Stamenov, whose testimony Milošević refers to, was unable to confirm whether the abbreviation "VSBY (M)" indicates a measurement of the visibility in metres.[310] Therefore, the issue was brought to the Trial Chamber's attention and the Appeals Chamber has to presume that the Trial Chamber duly considered the question of whether Exhibit D362 did in fact contain information about visibility and rejected Milošević's contention to the contrary.[311] The Appeals Chamber recalls that Trial Chambers' decisions on issues of evaluation of evidence must be given a margin of deference and it is only where an abuse of such discretion can be established that the Appeals Chamber will reverse such decisions.[312] In the circumstances of the present case,

[304] Prosecution Response Brief, para. 73.
[305] Prosecution Response Brief, para. 73.
[306] Prosecution Response Brief, para. 74.
[307] Prosecution Response Brief, para. 74, referring to Trial Judgement, para. 753, fn. 2675.
[308] Although the Prosecution refers to paragraph 992 of the Trial Judgement, the Appeals Chamber understands that the Prosecution actually meant para. 993 as referred to by Milošević.
[309] Prosecution Response Brief, para. 75.
[310] Ivan Stamenov, 22 Aug 2007, T. 9067.
[311] Trial Judgement, paras 265, 323, 396.
[312] *Halilović* Appeal Judgement, para. 39.

the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that the abbreviation "VSBY (M)", when read in the context of the exhibit,[313] indicates visibility in metres. Accordingly, it did not err in relying on this information when making the relevant findings on visibility with regard to the sniping incidents on 8 October 1994, 24 October 1994, and 3 March 1995.

115. The Appeals Chamber will address Milošević's argument as to the purpose of the siege of Sarajevo under its analysis of his fourth ground of appeal.[314]

116. Finally, the Appeals Chamber recalls that the Trial Chamber reached the following findings about the psychological consequences of the attacks on the civilian population of Sarajevo:

> 910. Not only was the civilian population starved and deprived of its opportunity to leave the city for fourteen months, it was also subjected during that period to conditions which would inevitably instil extreme fear and create insecurity by virtue of the incessant sniping and shelling of the city. The inability to escape from this trap of horror for any extended period of time unavoidably weakened the besieged population's will to resist, and worse, it left deep and irremovable mental scars on that population as a whole. […]
>
> 993. The evidence also shows that the SRK succeeded in spreading the terror it intended to cause. The resulting suffering of the civilian population is an element of the crime of inhumane acts and is relevant for an assessment of the gravity of the crimes. As described by many witnesses, there was no safe place to be found in Sarajevo; one could be killed or injured anywhere and anytime. […]
>
> 1001. Moreover, the Accused introduced to the Sarajevo theatre, and made regular use of, a highly inaccurate weapon with great explosive power: the modified air bomb. It is plain from the evidence that the indiscriminate nature of these weapons was known within the SRK. The modified air bombs could only be directed at a general area, making it impossible to predict where they would strike. Each time a modified air bomb was launched, the Accused was playing with the lives of the civilians in Sarajevo. The psychological effect of these bombs was tremendous. […]

The Appeals Chamber further notes that the psychological consequences of the attacks formed part of Milošević's conviction for the crime of terror pursuant to Article 3 of the Statute.[315]

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[313] The Appeals Chamber notes that Exhibit D362 provides also information on the direction and speed of the wind, the sky condition, and the rain and fog conditions for the relevant days.
[314] See *infra*, Section VI.C.2, para. 133.
[315] See *supra*, Section III.B.2.(a), para. 35. *Cf.* also *Galić* Appeal Judgement, para. 102. See Trial Judgement, paras 740-746, 910.

117. Milošević fails to show that no reasonable trier of fact could have reached the above-mentioned findings on the basis of the evidence referred to throughout the Trial Judgement. The Appeals Chamber has repeatedly held that the purpose of an expert testimony is to provide specialized knowledge that might assist the trier of fact in understanding the evidence before it.[316] Milošević fails to substantiate his assertion that in the circumstances of the present case it was necessary for the Trial Chamber to resort to such specialised knowledge. The Appeals Chamber recalls in this respect the evidence heard by the Trial Chamber that, notwithstanding the varying intensity of the conflict, civilians were continuously exposed to shelling and sniping.[317] Specifically, the Appeals Chamber notes Section II.E.7(c) of the Trial Judgement where the Trial Chamber considered voluminous evidence showing the psychological impact the shelling and sniping had on the civilian population.[318] On numerous occasions, witness testimonies highlighted the psychological strains of living in Sarajevo during the Indictment period.[319] For instance, witness W-107 stated that her daughters often returned from collecting water or firewood with their clothes "soiled […] because of the fear they had".[320] Witness Nakaš, a doctor at the State Hospital, recalled that very often the number of people with "mental disturbances" would exceed that of patients with physical injuries.[321] Other witnesses testified about the extreme fear they had suffered throughout the war and the lasting psychological effects they were still experiencing.[322] The Appeals Chamber also notes that when discussing Milošević's responsibility, the Trial Chamber had expressly stated its intention not to repeat the evidence on which it had relied at length elsewhere in the Trial Judgement.[323] Considering the Trial Judgement as a whole, the Appeals Chamber finds that Milošević has not shown that no reasonable trier of fact could have reached the findings at paragraphs 910, 993, and 1001 of the Trial Judgement beyond reasonable doubt.

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[316] *Nahimana* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.
[317] Trial Judgement, paras 195-197 and the evidence referred to therein.
[318] Trial Judgement, paras 740-746 and the evidence referred to therein.
[319] Trial Judgement, paras 291, 294, 328, 499, 546 and 725-733.
[320] W-107, D116 (under seal), p. 5.
[321] Bakir Nakaš, 29 Jan 2007, T. 1101-1102.
[322] Alma Mulaosmanović, 6 Feb 2007, T. 1658-1659; Ismet Alić, P640, p. 9; Anđa Gotovac, P522, p. 2; Derviša Selmanović, P170, p. 3; Fikreta Pačariz, P643, p. 10; Sabina Šabanić, P154, p. 2; W-107, D116 (under seal), p. 5.
[323] Trial Judgement, para. 868.

118. For the reasons set out above, Milošević's second ground of appeal is dismissed subject to the Appeals Chamber's findings with respect to the siege of Sarajevo addressed under Milošević's fourth ground of appeal.[324]

[324] See *infra*, Section VI.C.2, para. 133.

V. ALLEGED FAILURE TO CONSIDER THE EVIDENCE AS A WHOLE (MILOŠEVIĆ'S THIRD GROUND OF APPEAL)

A. Arguments of the parties

119. Milošević argues that the Trial Chamber failed to consider the evidence as a whole, and in particular, that it ignored "almost completely" the evidence showing the military activity of the ABiH.[325]

120. The Prosecution responds that the Trial Chamber did in fact take into account all the evidence before making its findings.[326] In relation to the conduct of the ABiH, the Prosecution specifically highlights a number of examples where the Trial Chamber took into account evidence relating to its activities,[327] as well as the Trial Chamber's analysis of the origin of fire with regard to each shelling and sniping incident.[328]

B. Analysis

121. The Appeals Chamber finds that Milošević fails to substantiate his argument that the Trial Chamber did not consider all the evidence on the record.[329] He further fails to identify the challenged factual findings or to provide any reasoning as to the way in which the ABiH military activities could affect the Trial Chamber's determinations with regard to the specific shelling and sniping incidents. Accordingly, his mere assertion that the Trial Chamber "ignored almost completely" certain evidence fails to meet the standard of review on appeal.[330]

122. Moreover, the Appeals Chamber notes that Milošević's contention that the Trial Chamber failed to consider evidence showing the military activity of the ABiH is patently incorrect. In paragraphs 780 to 788 of the Trial Judgement, the Trial Chamber gave extensive consideration to evidence pertaining to the attacks carried out by the ABiH in and around Sarajevo during the Indictment period. It explicitly rejected Milošević's contention that those military activities could

[325] Defence Appeal Brief, para. 150; Defence Reply Brief, para. 10.
[326] Prosecution Response Brief, para. 77.
[327] Prosecution Response Brief, para. 78, fn. 243.
[328] Prosecution Response Brief, para. 78, fn. 244.
[329] See Defence Appeal Brief, para. 150, referring to Defence Appeal Brief, paras 42-99.
[330] *Cf. Mrkšić and Šljivančanin* Appeal Judgement, para. 224.

exonerate him.[331] Milošević fails to demonstrate that the Trial Chamber's evaluation of the evidence in this regard was erroneous.

123. The Appeals Chamber will not entertain Milošević's vague contention that the Trial Chamber failed to consider the totality of the evidence "[t]hroughout the Judgement".[332] The Appeals Chamber reiterates that unless a party successfully demonstrates that any particular piece of evidence was completely disregarded, it should be presumed that the Trial Chamber evaluated all the evidence presented to it.[333] Consequently, Milošević's argument is dismissed as a mere assertion that the Trial Chamber failed to consider relevant evidence without showing why no reasonable trier of fact could reach the same conclusion as the Trial Chamber did.[334]

124. In light of the foregoing, Milošević's third ground of appeal is dismissed.

[331] Trial Judgement, paras 780-788; see also *id.*, paras 169-173.
[332] Defence Appeal Brief, p. 50.
[333] *Mrkšić and Šljivančanin* Appeal Judgement, para. 224; *Kvočka et al.* Appeal Judgement, para. 23. The Trial Chamber in this case also specified that it "considered the entirety of the trial record and evaluated all the evidence that was presented and duly apportioned the weight to be given to it" and emphasized that "if a piece of evidence is not mentioned in [the Trial] Judgement, that does not mean that it has not been considered" (Trial Judgement, para. 9).
[334] See *supra*, Section II, para. 17(ii).

VI. ALLEGED ERRORS CONCERNING THE TRIAL CHAMBER'S FINDINGS IN RELATION TO THE CIVILIAN STATUS OF THE TRAMS AND THE SIEGE OF SARAJEVO (MILOŠEVIĆ'S FOURTH GROUND OF APPEAL)

A. Civilian status of trams

1. Arguments of the parties

125. Under the first sub-ground of appeal, Milošević challenges the Trial Chamber's finding that the presence of one or two soldiers on a tram did not alter its civilian status.[335] He argues that the presence of a single soldier may convert a tram into a military objective as long as the tram is being used for military purposes.[336] Accordingly, he submits that the Trial Chamber erred in defining trams as civilian targets *in abstracto*, disregarding the fact that they were transporting soldiers.[337]

126. The Prosecution responds that contrary to Milošević's assertion, the Trial Chamber determined *in concreto* that trams in Sarajevo had civilian status. It argues that the Trial Chamber considered that the civilian status of an object can change when its use makes an effective contribution to military action and correctly concluded that one or two soldiers travelling on a tram did not convert the latter into a military objective.[338]

2. Analysis

127. The Appeals Chamber recalls that Article 52(2) of Additional Protocol I to the Geneva Conventions provides that

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

128. It has been held by the Appeals Chamber that the presence of individual combatants within the population attacked does not necessarily change the legal qualification of civilian population

[335] Defence Appeal Brief, para. 151, referring to Trial Judgement, para. 224.
[336] Defence Appeal Brief, para. 151.
[337] Defence Appeal Brief, para. 152.
[338] Prosecution Response Brief, para. 81, referring to Article 52 of Additional Protocol I.

and, by analogy, of civilian objects.[339] In the instant case, the Appeals Chamber notes that the Trial Chamber considered evidence showing that trams were not used for transportation of troops or military equipment.[340] Witness Van der Weijden testified that (i) a tram is not well-suited for military use or transportation of military personnel; (ii) there was no reason to identify a tram as a threat or its passengers as combatants; and (iii) it must have been known to snipers that only civilians used the trams.[341] Further, the Trial Chamber considered at length the significance of trams to the civilian population in Sarajevo and their general usage in the city.[342] In addition, with regard to each sniping incident involving a tram, the Trial Chamber explicitly considered whether there was any military personnel present on the vehicle or in its vicinity at the time of the incident.[343] Concerning the sniping incidents on 8 October 1994,[344] 21 November 1994,[345] 23 November 1994,[346] and 3 March 1995,[347] the evidence clearly shows that there were neither soldiers on the trams in question nor military activities or establishments in the immediate area. With regard to the sniping incident on 27 February 1995, the Trial Chamber received conflicting evidence as to the presence of soldiers on the tram. Witness W-118 testified that she saw one ABiH soldier,[348] whereas witness Mulaosmanović stated that no military personnel was present.[349] Despite this inconsistency, Milošević's assertion that the presence of a soldier converted the tram into a military target due to the fact that it was used for transportation of the military, is untenable. Accordingly, Milošević fails to point to any error of law or fact made by the Trial Chamber in this respect.

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[339] *Galić* Appeal Judgement, para. 136. *Cf. Kordić and Čerkez* Appeal Judgement, para. 419 concluding that, in the absence of information that the civilian objects in question were used for military purposes, the attacks against such objects qualified for unlawful attacks on civilian objects.
[340] Trial Judgement, para. 218, referring to Avdo Vatrić, P647, p. 8.
[341] Trial Judgement, para. 219, referring to Patrick Van der Weijden, 29 Mar 2007, T. 4284-4285; Exhibit P514, pp. 21, 27, 30, 34, 38.
[342] Trial Judgement, paras 214, 218-220, 223-224, 251-324.
[343] Trial Judgement, para. 254 (regarding the sniping of Alma Ćutuna on 8 October 1994); para. 267 (regarding the sniping of Hajrudin Hamidić on 21 November 1994); para. 278 (regarding the sniping of Afeza Karačić and Sabina Šabanić on 23 November 1994); para. 297 (regarding the sniping of Senad Kešmer, Alma Mulaosmanović and Alija Holjan on 27 February 1995); para. 313 (regarding the sniping of Azem Agović and Alen Gičević on 3 March 1995).
[344] Trial Judgement, para. 254, referring to W-35, 22 Jan 2007, T. 827-828 (private session); W-35, 23 Jan 2007, T. 847-848; W-28, 22 Feb 2007, T. 2752; Exhibit P92 (under seal), p. 3.
[345] Trial Judgement, para. 267, referring to W-54, 6 Feb 2007, T. 1695 (private session).
[346] Trial Judgement, para. 278, referring to Afeza Karačić, 29 Jan 2007, T. 1185; Huso Palo, P162, p. 2; Sabina Šabanić, P154, p. 2; Exhibit P115, p. 2.
[347] Trial Judgement, para. 313, referring to Slavica Livnjak, 23 Jan 2007, T. 877-878; Exhibit P95, p. 3.

B. Civilian status of victims

129. Under the second sub-ground of appeal, Milošević challenges the civilian status of Derviša Selmanović and that of the victims of the shelling of the Markale Market on 28 August 1995.[350] The Appeals Chamber addresses Milošević's submissions in this regard in its analysis of the related arguments under Milošević's first and seventh grounds of appeal.[351]

C. Siege

1. Arguments of the parties

130. Under the third sub-ground of appeal, Milošević contests the use of the term "siege" in paragraph 751 of the Trial Judgement, claiming that the Trial Chamber's definition in this regard is contradictory. He further argues that the finding that Sarajevo was under "siege" was made without reference to any legal source and without explaining its legal consequences.[352] In addition, under his first ground of appeal, Milošević alleges that the Trial Chamber committed a factual error in paragraph 138 of the Trial Judgement by concluding that "most of the hills surrounding Sarajevo were controlled by the SRK."[353] Consequently, he challenges the findings in paragraphs 139 and 751 of the Trial Judgement, arguing that they are not the only conclusions reasonably possible. Another possible conclusion he suggests is that "the two warring parties dominated one another in the different parts of Sarajevo", which, he argues, militates against his guilt.[354]

131. The Prosecution submits that Milošević fails to show how his argument on the definition of siege has an impact on the verdict.[355] It contends that the Trial Chamber's finding in this regard was a factual rather than legal determination and was premised on the fact that the population "was deprived of its right to leave the city freely".[356] The Prosecution argues therefore that no indication of the legal source was required and that the Trial Chamber did not attach any particular legal

[348] Trial Judgement, para. 297, referring to W-118, 6 Feb 2007, T. 1623, Exhibit P175 (confidential), p. 2.
[349] Trial Judgement, para. 297, referring to Alma Mulaosmanović, 6 Feb 2007, T. 1656.
[350] Defence Appeal Brief, para. 153.
[351] See *supra*, Section III.C.2.(e)(ii), para. 97 and *infra,* Section VIII.D.2, para. 199 *et seq*.
[352] Defence Appeal Brief, para. 154.
[353] Defence Appeal Brief, para. 139.
[354] Defence Appeal Brief, para. 140.
[355] Prosecution Response Brief, para. 85.
[356] Prosecution Response Brief, para. 85, referring to Trial Judgement, paras 111-139 and 725-751.

consequences to this determination.[357] Concerning the Trial Chamber's factual finding that the SRK controlled the majority of the mountains surrounding Sarajevo, the Prosecution claims that Milošević fails to show that a reasonable Trial Chamber would have preferred the evidence referred to by him or come to a different conclusion.[358]

2. Analysis

132. The Appeals Chamber notes that in paragraph 751 of the Trial Judgement, the Trial Chamber concluded that, even though not completely surrounded, the city of Sarajevo was "effectively besieged" by the SRK forces. In this regard, the Trial Chamber explicitly considered the existence of a protracted campaign during which the civilian population was denied regular access to essential supplies and was deprived of the opportunity to leave the city freely.[359] The Appeals Chamber notes that Milošević has not challenged any of those factual findings or the evidence relied thereon. Rather, he seems to challenge the usage of the term "siege", without showing how the use of a different term would have affected any of the underlying determinations relevant to his conviction. Considering that the Trial Chamber only used this term as a means of describing the factual situation before it by referring to the conditions in which the population of Sarajevo was trapped throughout the Indictment period, and did not ascribe to it any legal qualification, the Appeals Chamber finds that Milošević fails to demonstrate that the Trial Chamber committed any error of law or of fact.

133. Concerning Milošević's argument raised under his second ground of appeal,[360] the Appeals Chamber finds the question of whether the siege was meant to "compel the BiH Government to capitulate" to be irrelevant to Milošević's conviction.[361] Nonetheless, the Appeals Chamber finds that the Trial Chamber properly based its findings about the purpose of the siege on the evidence. In particular, the Trial Chamber considered the testimony of witness Harland that the campaign was part of a strategy to force the Bosnian government, through the application of "pressure", to capitulate on terms favourable to the Bosnian Serbs.[362] Milošević fails to show how the Trial Chamber's reliance on this evidence was erroneous.

[357] Prosecution Response Brief, para. 85.
[358] Prosecution Appeal Brief, para. 67.
[359] Trial Judgement, para. 751.
[360] See *infra*, Section IV, paras 112, 115.
[361] See *supra,* Section II, para. 17(iii).
[362] Trial Judgement, para. 753, referring to David Harland, 15 Jan 2007, T. 324-330.

134. With regard to Milošević's allegation that the Trial Chamber committed factual errors in paragraphs 138, 139 and 751 of the Judgement, the Appeals Chamber reiterates that a party may not merely repeat on appeal arguments that did not succeed at trial unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber.[363] In this regard, the Appeals Chamber notes that the Trial Chamber examined voluminous evidence on the areas of responsibility of the warring factions[364] and already considered Milošević's arguments concerning the ABiH positions in and around Sarajevo.[365] Milošević fails to show why the rejection of his arguments at trial was erroneous.[366] The Appeals Chamber further notes that he fails to show how the conclusion that "the SRK and ABiH dominated one another in the different parts of Sarajevo" could have an impact on the Trial Chamber's findings contained in paragraphs 138, 139, and 751 of the Judgement and ultimately on his conviction. Therefore, Milošević's submission is dismissed.

D. Milošević's responsibility during his absence from Sarajevo

135. Finally, under the fourth sub-ground of appeal, Milošević contends that the Trial Chamber erred in failing to recognize that his "total inability to act" in the period from 6 August 1995 to 10 September 1995 exempted him from criminal responsibility.[367] The Appeals Chamber will address these arguments in the framework of its analysis of Milošević's twelfth ground of appeal below.[368]

E. Conclusion

136. In light of the foregoing, the Appeals Chamber dismisses Milošević's fourth ground of appeal, subject to the analysis of Milošević submissions regarding his absence from Sarajevo.

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[363] See *supra,* Section II, para. 17 (vii) and Section III.C.1.(b), para. 48.
[364] Trial Judgement, paras 111-140, and the evidence referred to therein.
[365] Trial Judgement, paras 747-751, 761-788, and the evidence referred to therein.
[366] Defence Final Brief, paras 33-62.
[367] Defence Appeal Brief, paras 155-156. See also AT. 84-85.
[368] See *infra*, Section XI.B.2.

VII. ALLEGED ERRORS OF FACT REGARDING THE CIVILIAN STATUS OF CERTAIN AREAS IN SARAJEVO (MILOŠEVIĆ'S SIXTH GROUND OF APPEAL)

A. Arguments of the parties

137. Further to his contention that the Trial Chamber erred regarding the determination of whether the SRK attacks were directed against a civilian population raised under his first ground of appeal,[369] Milošević argues that the Trial Chamber erred in fact in finding that Vojničko Polje, Alipašino Polje, Dobrinja, Sedrenik, Hrasnica, and Marin Dvor were civilian areas within the city of Sarajevo between 10 August 1994 and 11 November 1995.[370] In support of these allegations, Milošević first refers to his earlier arguments that each of these zones contained military objectives,[371] and notes that the 104th and 105th brigades of the ABiH 1st Corps had their combat positions in these zones and acted continuously against SRK units, thus rendering the SRK's military activities "perfectly legal".[372] As a general argument in this regard, he emphasizes that the presence of military objectives in those zones "is important for the finding that civilians were deliberately targeted".[373]

138. The Prosecution responds that Milošević failed to demonstrate that no reasonable Trial Chamber could have reached the conclusion that there was an attack directed against the civilian population.[374] It notes the Trial Chamber's findings on civilian victims, the number of civilians in the relevant areas, and the manner in which they were targeted,[375] and argues that Milošević's assertions are based on a misconception of the existence of military zones.[376] The Prosecution emphasizes that, while the Trial Chamber recognised that there were military targets inside the confrontation lines, specifically referring to Exhibit P194, a military map of Sarajevo, it

[369] See *supra*, Section III.C, para. 42.
[370] Defence Appeal Brief, paras 167-169, referring to Trial Judgement paras 342, 379, 480, 896 - 903.
[371] Defence Appeal Brief, para. 167, referring to Defence Appeal Brief, paras 50-81.
[372] Defence Appeal Brief, para. 167, referring to Exhibit P194. See also AT. 48-51, 58-62, 64, 132.
[373] Defence Appeal Brief, para. 166.
[374] Prosecution Response Brief, para. 98.
[375] Prosecution Response Brief, para. 98.
[376] Prosecution Response Brief, paras 22-26, 99.

nevertheless concluded that the presence of such targets did not render entire areas of the city military zones.[377]

B. Analysis

139. The Appeals Chamber notes that Milošević's argument about the existence of "military zones that were either completely free of civilians or deprived of their civilian status owing to the high number of military targets present among the civilians and civilian property" was considered at trial.[378] The Trial Chamber established in this regard that the population preserved its civilian status despite both the flow of combatants[379] and the existence of ABiH command posts within the confrontation lines.[380] Taking into account all the population fluctuations, the Trial Chamber established that the population in certain urban areas within the confrontation lines remained civilian in status.[381] The Appeals Chamber has already found that despite the somewhat confusing language used by the Trial Chamber, it correctly engaged in a case-by-case analysis of the targets and modalities of the attacks, rather than that of "zones".[382] Therefore, the Appeals Chamber will pursue its analysis on the basis of its understanding that when referring to certain neighbourhoods of Sarajevo, the Trial Chamber meant to establish the civilian status of the population targeted in the attacks that took place there during the Indictment period (and not that of the areas or zones as such). In any case, the Trial Chamber extensively examined and rejected Milošević's submissions that particular areas of Sarajevo, notably Sedrenik[383], Vojničko Polje,[384] Dobrinja,[385] and Hrasnica,[386] were to be considered military zones.[387]

140. Regarding the area of Sedrenik in which three sniping incidents occurred,[388] the Trial Chamber's findings with respect to the civilian status of the population are based on a variety of

[377] Prosecution Response Brief, paras 100-101.
[378] Trial Judgement, para. 890.
[379] Trial Judgement, paras 894–897.
[380] Trial Judgement, para. 898, referring to Exhibit P194.
[381] Trial Judgement, para. 896.
[382] See *supra*, Section III.C.1.(b)(ii), para. 55.
[383] Trial Judgement, paras 342, 901.
[384] Trial Judgement, paras 379, 902-903.
[385] Trial Judgement, para. 379.
[386] Trial Judgement, paras 480, 899-900.
[387] Trial Judgement, para. 898.
[388] The sniping of Sanela Dedović (Trial Judgement, paras 343-354); Derviša Selmanović (Trial Judgement, paras 355-366), and Tarik Žunić (Trial Judgement, paras 367-378).

sources that have not been challenged by Milošević.[389] Moreover, the Trial Chamber reached its conclusions without excluding that there may have been some fighting going on in the area.[390] During the Appeals Hearing, Milošević referred to evidence showing the intensity of the conflict in Sedrenik.[391] However, the Appeals Chamber is not convinced by Milošević's argument that the amount of ammunition fired from a particular area is indicative of the status of the population residing therein. Accordingly, the Appeals Chamber finds that Milošević has not substantiated his claim on appeal and failed to demonstrate that no reasonable trier of fact could find that the population targeted by the incidents in Sedrenik had civilian status, especially given that it was a residential neighbourhood during the Indictment period.[392]

141. Regarding Vojničko Polje and Dobrinja, the Trial Chamber found that the population there was civilian,[393] despite the presence of an ABiH dormitory in the former neighbourhood and some movements by armed men in the latter.[394] The Trial Chamber's analysis of the single incidents in these areas specifically addresses the issue of whether there was military activity in the vicinity of the victims as well as other relevant factors in characterizing each incident of sniping as an attack directed against civilians.[395] Milošević does not substantiate how these findings are erroneous.

142. Regarding Hrasnica, the Trial Chamber also found that the population there had civilian status, despite Milošević's submission at trial that it was a military zone.[396] The shelling incidents in Hrasnica took place on 7 April 1995, 1 July 1995 and 23 July 1995.[397] The Trial Chamber found

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[389] Trial Judgement, paras 342 and 901, referring to Exhibits P514, p. 49; Nedžib Đozo, P363, p. 2; Derviša Selmanović, P169, p. 2; Harry Konings, 12 Mar 2007, T. 3553-3554.

[390] See, *e.g.*, Trial Judgement, para. 344 ("As she did not hear any shooting on 22 November 1994, she decided to run across the intersection"). The Trial Chamber also found that Sedrenik was held by the ABiH with the confrontation lines running across the hills and that the SRK controlled Špicasta Stijena (Trial Judgement, paras 131, 140).

[391] AT. 131-133, referring to Exhibits D437; D505; D236.

[392] Trial Judgement, para. 342. Milošević does not appear to contest this finding.

[393] Trial Judgement, para. 379, referring to paras 119-120 and 902-903. In paragraph 896 of the Trial Judgement, the Trial Chamber noted that the population of Dobrinja territory numbered "27,000 persons, with the presence of 2,200 troops of the Dobrinja Brigade" which did not affect the civilian status of the population in this area. The Trial Chamber did not disregard the testimony provided by witnesses T-52 and T-60, but was rather convinced by the testimonies of witnesses W-62, Krečo and T-52 in order to conclude that Vojničko Polje was an area with civilian population (Trial Judgement, para. 903).

[394] Trial Judgement, paras 903 and 120.

[395] The sniping of Adnan Kasapović (Trial Judgement, para. 380) and Šemsa Čovrk (Trial Judgement, para. 407) – although the latter incident was not attributed to the SRK (see Trial Judgement, para. 414).

[396] Trial Judgement, paras 480 and 899-900.

[397] Trial Judgement, para. 899.

that the fighting which occurred from the end of March until early April 1995 took place "many kilometres away from Hrasnica"[398] and that in April 1995 troop movement through the area was not "on a scale that would alter the civilian status of Hrasnica".[399] With respect to the incidents of July 1995, the Trial Chamber found that while ABiH troops attacked the Neđarići barracks several kilometres from Hrasnica, there was no indication that "troops moved through Hrasnica on a scale that would alter the civilian status of the area".[400] Generally, the Trial Chamber held that the civilian status of the population in the area remained unchanged in April 1995 and during the summer offensive of 1995.[401] It also analysed the status of the particular targets and victims of the incidents.[402] Milošević fails to substantiate how any of these findings are erroneous.

143. In light of the above the Appeals Chamber is satisfied that the Trial Chamber correctly established that the population of Sedrenik, Vojničko Polje, Dobrinja, and Hrasnica had civilian status. Nevertheless, the Appeals Chamber emphasizes once again that the Trial Chamber was required to ascertain the character of the objective and the modalities of the SRK attack with regard to each sniping and shelling incident, as it did. Likewise, any alleged error of fact concerning the proper determination of the status of the objectives of SRK attacks must refer to the respective finding of the Trial Chamber with regard to a specific sniping or shelling incident. As Milošević fails to point to any such finding, the Appeals Chamber will not further review the Trial Chamber's analysis in this regard.

144. As far as the areas of Marin Dvor and Alipašino Polje are concerned, the Appeals Chamber notes that Milošević fails to discern the particular finding of the Trial Chamber he is contesting.[403]

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[398] Trial Judgement, para. 899.
[399] Trial Judgement, para. 899.
[400] Trial Judgement, para. 900.
[401] Trial Judgement, para. 900.
[402] Trial Judgement, paras 475-495, 624-652.
[403] The Appeals Chamber notes that regarding Marin Dvor (or "Marindvor"), where the State Hospital was located, together with other buildings such as the Parliament, the School for Technology, the UNIS Buildings, the Energoinvest Building and the Marshal Tito Barracks, the Trial Chamber found that it was ABiH-held territory, dominated by the hills of Debelo Brdo, also in ABiH hands (Trial Judgement, paras 115, 118, 151, 240). It also found that it was a dangerous area due to the sniping activities (*id.*, para. 908). Regardless of the military installations in Marin Dvor, the findings on the incidents in this area show that the Trial Chamber engaged in a careful assessment of the circumstances and found that the presence of military targets within the same broad area was irrelevant to the civilian status of the area. In particular, the Appeals Chamber notes that the sniping of individual civilians on trams may not be justified by the presence of military targets in the non-immediate vicinity (*id.*, paras 277-289 (incident of 23 November 1994) and paras 290-310 (incident of 27 February 1995)).

Accordingly, the Appeals Chamber will not consider his submissions with regard to these two areas.

145. For the foregoing reasons, this ground of appeal is dismissed in its entirety.

Regarding Alipašino Polje, another area controlled by the ABiH, the Appeals Chamber notes the Trial Chamber's findings that, at times, there was shooting coming from this area (Trial Judgement, paras 121, 233, 434, 763). The Trial Chamber also noted international protests against the shelling of a residential area in Alipašino Polje (*id.*, para. 852). When discussing the shelling of Trg Međunarodnog Prijateljstva (within this area) on 16 June 1995, the Trial Chamber came to the conclusion, based on the evidence, that no soldiers assisted the civil defence, nor were there any military installations or facilities in the vicinity (*id.*, para. 542, referring to W-107, 12 Mar 2007, T. 3514-3515). Moreover, it rejected the claims by Milošević about the intensity of the conflict on that day which could have had rendered the attack lawful (*id.*, paras 540, 553).

VIII. ALLEGED ERRORS WITH RESPECT TO THE FINDINGS THAT SRK MEMBERS WERE BEHIND SPECIFIC SNIPER FIRE (MILOŠEVIĆ'S SEVENTH GROUND OF APPEAL)

146. Under his seventh ground of appeal, Milošević submits that the Trial Chamber erroneously found that SRK members were behind specific sniper fire.[404] He argues that there is evidence of various factors likely to cast a reasonable doubt on the origin of the sniper fire,[405] including the location of the confrontation lines, the changing positioning of snipers, faulty police reports based on rumours, the use of stray bullets, possible ricochets, cases of ABiH shooting against civilians on their territory in order to create panic, difficulties in establishing the direction of fire, and pre-existing damage to old buildings.[406]

147. The Appeals Chamber understands Milošević to be alleging both an error of law (the misapplication of the required standard of proof) as well as a number of errors of fact. It will consider the arguments according to the five sub-grounds presented by Milošević.

A. Incident of 14 May 1995

148. In convicting Milošević, the Trial Chamber considered, *inter alia*, the unscheduled sniping incident relating to the killing of Jasmina Tabaković.[407] The Trial Chamber found that Tabaković, a civilian, was fatally shot in her bedroom in Dobrinja.[408] It concluded that the shot originated from SRK-held territory in Dobrinja and that it was fired by a member of the SRK.[409]

1. Arguments of the parties

149. Milošević argues that the Trial Chamber erred in finding that Tabaković was killed by a bullet fired by a member of the SRK from SRK-held territory in Dobrinja.[410] In light of the military situation in Dobrinja, he submits, the Trial Chamber could have found that the origin of the shot had been established beyond reasonable doubt only if a number of factors had been proven.[411] These

[404] Defence Appeal Brief, para. 170.
[405] Defence Appeal Brief, para. 170.
[406] Defence Appeal Brief, para. 170.
[407] Trial Judgement, paras 246-249.
[408] Trial Judgement, para. 250.
[409] Trial Judgement, para. 250.
[410] Defence Appeal Brief, para. 171.
[411] Defence Appeal Brief, para. 171, referring to the Defence Appeal Brief, paras 66 and 170.

factors include the victim's location and position at the time of impact, and the place where the bullet entered and exited the victim's body.[412] Although, according to the Bosnian police report, Tabaković's father found her body in the hallway by the bedroom door, Milošević argues that this element alone was insufficient to establish the origin of fire beyond reasonable doubt.[413]

150. The Prosecution responds that Milošević has failed to show an error.[414] It argues that the Trial Chamber made a proper determination of the direction and origin of fire, based on the totality of consistent evidence, including the trajectory of the bullet, and concluded that the shot came from SRK-held territory.[415] With respect to the position of the victim when she was hit, the Prosecution submits that Milošević fails to explain how it would impact on the Trial Chamber's assessment of the origin of fire.[416]

2. Analysis

151. In the introductory part of the Trial Judgement's section relating to sniping incidents, the Trial Chamber stated:

> The Trial Chamber will now consider specific incidents of sniping. In determining whether the crimes were committed, it will take into consideration the following factors: (i) whether the person who was killed or seriously wounded was a civilian; (ii) the type of weapon that inflicted the injury; and (iii) whether, as the Prosecution alleges, the shots were fired from Bosnian Serb-held territory. In this regard, the Trial Chamber will pay particular attention to the direction and origin of fire.[417]

As for the incident in question, the Trial Chamber made its findings on the basis of the testimony of witnesses W-28 and W-138, as well as the documentary evidence.[418] For reasons explained below, the Appeals Chamber is satisfied that the Trial Chamber concluded beyond reasonable doubt that the shots were fired by an SRK member.[419]

152. Milošević submits that the Trial Chamber could have found that the origin of the shot had been established only if it established all the factors mentioned in his submission beyond reasonable

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[412] Defence Appeal Brief, para. 171, referring to Exhibit D360, p. 13.
[413] Defence Appeal Brief, para. 173, referring to Exhibit P796 (under seal).
[414] Prosecution Response Brief, para. 105.
[415] Prosecution Response Brief, para. 106, referring to the Trial Judgement, paras 247-250.
[416] Prosecution Response Brief, para. 107.
[417] Trial Judgement, para. 245.
[418] Trial Judgement, para. 247, referring to Exhibit P796 (under seal), p. 2; see also Trial Judgement, para. 250.
[419] See also *supra*, Section III.A.1, para. 22.

doubt, and in particular, the victim's position when she was hit by the bullet.[420] The Appeals Chamber recalls that only the facts which are material to the elements of the crime must be proved beyond reasonable doubt.[421] The factors that Milošević refers to are simply indicia that *may* be taken into account by the Trial Chamber in its case-specific assessment of evidence in order to reach a conclusion beyond reasonable doubt. There is neither an exhaustive list of factors that should be taken into account to establish a fact beyond reasonable doubt, nor a requirement as to the number of factors to be assessed.[422]

153. Milošević also challenges the Trial Chamber's finding that Tabaković was killed by a bullet fired by a member of the SRK in light of the military situation in Dobrinja.[423] The Appeals Chamber notes that witness W-28, who was part of the BiH police investigation team, testified that Dobrinja was divided between ABiH and SRK forces.[424] The Trial Chamber found that although the BiH police did not have reports of combat activity for the evening of 14 May 1995, Tabaković's father reported that shots had been fired from the Bosnian Serb positions in Dobrinja I.[425] In addition, witness W-138, a crime technician with the BiH police, testified that "[b]ased on the traces, [he] could establish where the bullet had come from".[426] This was accomplished by tracing the penetration of the bullet through the plastic sheet, through the cupboard, and then the place where the bullet was recovered from the wall behind the cupboard.[427] Witness W-138 indicated that the investigation team connected these two points with a string, and were able to establish the bullet's precise trajectory.[428] Witness W-138 found that the bullet came from apartment buildings

[420] Defence Appeal Brief, paras 171-173.
[421] See *supra,* Section III, para. 20.
[422] See *supra,* Section III.C.2.(a)(ii), para. 67. The Trial Chamber pointed out that witness Stamenov, ballistic expert called by Milošević, "also examined the incidents and emphasized in his report that the type of weapon used and the origin of fire cannot be established without material traces recorded at the site, establishing the nature of the damage to the tram, the entry and exit wounds of the victims, and the type and origin of the wounds." (Trial Judgement, para. 244). The Trial Chamber noted witness Stamenov's observation that not all information was available for all of the incidents (Trial Judgement, para. 244). On appeal, Milošević merely repeats the argument raised at trial and does not show that rejecting them constituted such an error as to warrant the intervention of the Appeals Chamber, *i.e.* that the Trial Chamber committed a specific error of law or fact invalidating the decision or weighed relevant or irrelevant considerations in an unreasonable manner (see *supra*, Section II, para. 17(vii)).
[423] Defence Appeal Brief, para. 171.
[424] W-28, 22 Feb 2007, T. 2762 (private session).
[425] Trial Judgement, para. 248.
[426] W-138, 31 Jan 2007, T. 1338.
[427] W-138 31 Jan 2007, T. 1338.
[428] W-138, 31 Jan 2007, T. 1338.

in Dobrinja I, which was under SRK control.[429] Milošević does not show that the Trial Chamber erred in relying on this evidence.[430]

154. In light of the foregoing, this sub-ground of appeal is dismissed.

B. Tramway incidents

1. Arguments of the parties

155. Under his second sub-ground of appeal, Milošević submits that the Trial Chamber erred in finding that trams were deliberately targeted by SRK snipers.[431] He submits that the Trial Chamber committed an error of law in failing adequately to consider tram routes in the period indicated by the indictment, and notably the fact that they ran very close to the confrontation lines and, contrary to the finding of the Trial Chamber, operated during combat activity.[432] In Milošević's view, this is relevant in determining whether the SRK deliberately attacked trams during this period.[433] He adds that the BiH Government decided to put the trams in operation essentially at the frontline.[434]

156. In particular, Milošević submits that the Trial Chamber committed an error of fact in finding that the trams were targeted by SRK members when they were driving along the "S" curve in front of the Holiday Inn Hotel, and that this showed the SRK's intent to spread terror among civilians.[435] Milošević claims that when following the curve, the tram was exposed to buildings on both sides of the confrontation line.[436] He further argues that considering that all the tramway incidents took place in the Marin Dvor zone, the Trial Chamber should have established beyond reasonable doubt a number of factors before concluding that sniper fire came from SRK-held territory. These factors include the tram's location and position at the moment of impact, as well as the places where the bullet pierced and exited the tram or the body of the victim.[437] He argues that the Trial Chamber did not establish these indicia and based its conclusions almost systematically on unclear Bosnian

[429] W-138, 31 Jan 2007, T. 1338.
[430] Trial Judgement, paras 248-249.
[431] Defence Appeal Brief, paras 176-177.
[432] Defence Appeal Brief, paras 176-180.
[433] Defence Appeal Brief, para. 177.
[434] Defence Appeal Brief, para. 180, referring to David Fraser, 8 Feb 2007, T. 1880.
[435] Defence Appeal Brief, para. 181, referring to Trial Judgement, para. 909.
[436] Defence Appeal Brief, para. 181
[437] Defence Appeal Brief, para. 182.

police reports. Milošević further asserts that the Trial Chamber accepted rumours as evidence that the SRK sharpshooters fired from the Metalka building.[438]

157. In response, the Prosecution submits that Milošević has failed to show any error on the part of the Trial Chamber, which based its decision on the totality of the evidence.[439] The Prosecution submits that the Trial Chamber was entitled to conclude that the trams had "civilian status", that they were "not suitable for military use," and that one or two soldiers on a tram could not alter its civilian status.[440] The Prosecution points out that, having considered the totality of the evidence, the Trial Chamber rejected Milošević's arguments that explained away the incidents of tramway sniping based on proximity of the trams to the confrontation lines.[441] The Prosecution submits that, contrary to Milošević's assertion, the mere fact that the trams ran close to the confrontation lines could not change their civilian status.[442]

158. The Prosecution argues that Milošević fails to show how his allegation that trams ran during combat could have altered the verdict; the Trial Judgement left open the possibility that trams were running, because it referred to the trams being recalled if combat commenced.[443] It further states that most of this evidence was explicitly considered by the Trial Chamber.[444] The Prosecution submits that the Trial Chamber reasonably found that repeated SRK sniping of trams at this location illustrated the perpetrator's intent to target passengers.[445] It contends that Milošević's argument that the ABiH could also target the S-curve cannot affect the Trial Chamber's findings that the particular shots under discussion were fired by the SRK.[446]

2. Analysis

159. The Trial Chamber found that snipers targeted Sarajevo trams,[447] that the shots originated from the SRK-held territory, and that they were fired by SRK members.[448] It noted that the evidence showed that trams did not run during periods of combat activity and were to return to the

[438] Defence Appeal Brief, para. 183.
[439] Prosecution Response Brief, para. 108.
[440] Prosecution Response Brief, para. 109.
[441] Prosecution Response Brief, para. 110.
[442] Prosecution Response Brief, para. 110.
[443] Prosecution Response Brief, para. 111.
[444] Prosecution Response Brief, para. 111.
[445] Prosecution Response Brief, para. 112.
[446] Prosecution Response Brief, para. 112.
[447] Trial Judgement, para. 216.
[448] Trial Judgement, paras 266, 276, 288-289, 307, 310 and 324.

depot if combat activity began.[449] The Trial Chamber was also satisfied that the targeted trams had civilian status.[450] It established that trams were not suitable for military use and that it was a well-known fact that they were used by civilians. Furthermore, the Trial Chamber found that the fact that one or two soldiers were travelling on a tram targeted by sniper fire does not alter its civilian status.[451]

160. Regarding Milošević's allegation that the trams ran during combat activity,[452] the Appeals Chamber notes that the Trial Chamber considered this argument at trial. It specifically noted Milošević's submission that trams were running just behind the confrontation lines and through an area with almost constant fighting going on, but concluded that "the evidence show[ed] that trams did not run during periods when there was combat activity and that the trams were told to return to the depot if combat activity began".[453] That said, the Trial Chamber did not rule out that there were instances during which trams ran during combat.[454] For this reason, and in light of the findings below confirming that the bullets were shot by the SRK snipers deliberately targeting civilians (and were not stray bullets shot by belligerents), any evidence that trams ran during combat does not contradict the Trial Chamber's findings *per se* and is thus without impact on Milošević's convictions.

161. Concerning Milošević's submission that trams were exposed to buildings (and thus sniper fire) on both sides of the confrontation line when driving along the S-curve,[455] the Appeals Chamber recalls that this issue was addressed at trial. Milošević cross-examined witness W-28 about a letter from General Michael Rose of UNPROFOR[456] to President Alija Izetbegović and

[449] Trial Judgement, para. 223.
[450] Trial Judgement, para. 224.
[451] Trial Judgement, para. 224.
[452] The Appeals Chamber notes that Milošević first refers to Exhibit D80 which consists of protest letters from General Rose to Dr Ganić, President Izetbegović and Karadžić dated 9 October 1994. The letters protest, *inter alia*, about the sniping incidents which took place from both sides of the confrontation lines. Secondly, Milošević cites Exhibit D146, which is a combat report of the ABiH Army dated 21 November 1994. It reports, *inter alia*, that rifle grenades were fired on a tram. Milošević also refers to Exhibit D38, an UNPROFOR report dated 23 November 1994. Lastly, Milošević refers to Exhibits D41 and P877, which he submits demonstrate that combat activities took place at the same time and in the same sector. Exhibit D41 is a fax copy of a report faxed to UNPROFOR Headquarters in Zagreb from the BiH Command, dated 28 February 1995. Exhibit P877 is a fax of a report from UNMO Headquarters in Bosnia Herzegovina addressed to UNMO Headquarters in Zagreb dated 28 February 1995.
[453] Trial Judgement, para. 223.
[454] The Appeals Chamber further notes that the testimony to which Milošević refers to support the contention that the BiH Government decided to put the trams back in operation practically on the first frontline does not actually support his statement. Defence Appeal Brief, para. 180, referring to David Fraser, 8 Feb 2007, T. 1880.
[455] Defence Appeal Brief, para. 181.
[456] W-28, 22 Feb 2007, T. 2752; Exhibit D80, pp. 3-4.

Radovan Karadžić,[457] which protested against sniping incidents that took place on 8 October 1994 "in the City of Sarajevo from both sides of the line of confrontation". The Trial Chamber noted that while the letter indicated that some sniping originated from both sides, it did not refer to a specific incident or location in or around Sarajevo,[458] including the incidents at issue here. Furthermore, Milošević raised this argument in his Final Trial Brief.[459] He fails to demonstrate how the Trial Chamber erred in rejecting it.

162. The Trial Chamber considered ample evidence that the sniping in question originated from SRK-held territory. On a general note, the Trial Chamber found that the SRK snipers were highly skilled.[460]

163. Concerning the sniping on 8 October 1994, various witnesses testified that shots came from the direction of the Metalka Building, which was held by the SRK and visible from the beginning of the S-curve.[461] Similarly, on the basis of witness testimony and documentary evidence, the Trial Chamber established that the incidents on 21 November 1994,[462] 23 November 1993,[463] and 27 February 1995,[464] were caused by sniper fire originating from the SRK positions in Grbavica.[465] Regarding the sniping of Azem Agović and Alen Gičević aboard a tram on 3 March 1995, the Trial Chamber found that although the exact location of the shooter could not be established by the BiH police, all the eye-witnesses and Prosecution expert witness Van der Weijden confirmed that the

[457] Trial Judgement, para. 264.
[458] Trial Judgement, para. 264.
[459] Defence Final Brief, para. 179.
[460] Trial Judgement, para. 909, referring to the evidence cited at paras 109, 204, 241.
[461] Trial Judgement, paras 253-266 where the Trial Chamber notes that (i) Prosecution expert witness Van der Weijden and witness W-35 testified that shots came from the Metalka Building; (ii) the driver of one of the trams told the BiH police that he thought the shots had come from the Metalka Building; (iii) after the second tram was targeted, four children were also shot and killed; (iv) witness W-54 testified that they had been shot from the Metalka Building; (v) a UNPROFOR report dated 8 October 1994 stated that a tram was fired at in the area of the Holiday Inn, resulting in the death of one civilian and the wounding of 11; (vi) the report also stated that the fire came from the Bosnian Serb Army in the area of the Jewish Cemetery, though investigations were ongoing.
[462] W-54, 6 Feb 2007, T. 1696-1698, 12 Feb 2007, T. 1955 (private session); Exhibit D56 (under seal), pp. 4-5.
[463] Afeza Karačić, 30 Jan 2007, T. 1192-1193; Kemal Bućo, 2 Feb 2007, T. 1495; Sabina Šabanić, 2 Feb 2007, T. 1453–1455; Exhibits P514, pp. 25-26; P515; P158, p. 2; P154, p. 2; P157.
[464] W-118, 6 Feb 2007, T. 1620, 1622-1623, 1636; Alma Mulaosmanović, 6 Feb 2007, T. 1653-1655, 1657, 1678; Alija Holjan, 4 Apr 2007, T. 4473; Exhibits P174 (under seal), p. 2; P176; P177; P178, p. 2; P179, p. 2; P180; P181; P525, p. 2; P526, p. 3; P104; D215.
[465] Trial Judgement, paras 276, 288, 307.

shots came from SRK-held Grbavica.[466] Milošević has not challenged any of this evidence and fails to show that the Trial Chamber erred in relying upon it. Likewise, his mere assertion that the Trial Chamber did not consider certain factors identified by Defence expert witness Stamenov,[467] is insufficient to demonstrate that the Trial Chamber erred in its evaluation of the totality of the evidence.

164. Milošević has failed to show that a reasonable trier of fact could not be satisfied beyond reasonable doubt that each of the said incidents involved SRK sniper fire. The Appeals Chamber emphasizes that sniping is premised on precision shooting, which makes target identification generally possible. Considering that the principle of distinction requires attacks to be directed *only* against military objectives and that the trams targeted in the specific incidents did not constitute such objectives, Milošević's argument that the trams ran close to the confrontation line is devoid of merit.

165. Accordingly, the Appeals Chamber finds that Milošević has failed to demonstrate an error in relation to the tramway incidents. This sub-ground of appeal is thus dismissed.

C. Incident of 18 November 1994

166. The Trial Chamber found that Dženana Sokolović was shot on the right hand side of her body and that the bullet entered through her abdomen and exited on the left side, continuing through her seven-year-old son Nermin Divović's head.[468] It concluded that the only reasonable inference to be drawn from the evidence was that the shot that killed Divović and injured Sokolović originated from the Metalka Building, a known SRK sniper position.[469] Accordingly, it concluded that the shots were fired by a member of the SRK.[470] Under his third sub-ground of appeal, Milošević submits that the Trial Chamber erred in several aspects of its assessment of this incident.[471]

[466] Trial Judgement, para. 322; Slavica Livnjak, 23 Jan 2007, T. 860, 862; Exhibits P514, p. 32; P165; P166; P94, p. 2; P95, p. 3; P97.
[467] Defence Appeal Brief, para. 182, referring to Exhibit D360.
[468] Trial Judgement, para. 340.
[469] Trial Judgement, para. 341.
[470] Trial Judgement, para. 341.
[471] Defence Appeal Brief, para. 184.

1. The origin of fire

(a) Arguments of the parties

167. Milošević contends that the Trial Chamber erred in finding that the bullet that killed Nermin Divović and wounded Dženana Sokolović was fired from the SRK territory.[472] He submits that it is vital to establish beyond reasonable doubt the position from which the bullet or bullets were fired because, from the evidence available, the Trial Chamber could have reasonably reached the conclusion that the fatal bullet came from the ABiH-controlled territory.[473]

168. Milošević further submits that the Trial Chamber should have considered the following indicia in determining the origin of fire: the victim's location and position at the time of impact, and the place where the bullet entered and exited the victim's body.[474] He contends that expert witness Van der Weijden's report indicates that certain rooms in the Metalka Building had the view of an area between the Museum and the Faculty of Philosophy and not of specific locations, as suggested by the Trial Chamber.[475] He argues, however, that nothing in this report indicates the foundation for his knowledge about the state of branches obstructing the view of the stretch between the Museum and the faculty during the war.[476] He further adds that it is possible that branches or other obstacles hindered this view at the time of the incident more than they did on 29 November 2006, when witness Van der Weijden took the photos presented on page 24 of his report.[477] In Milošević's view, the photographs, taken during the Trial Chamber's on-site visit, show that the spot marked by Sokolović as being where she was located when her son fell is not directly visible from the Metalka Building, if one assumes that the victims were fired at from the direction of Grbavica.[478]

169. In response, the Prosecution submits that the Trial Chamber reasonably found that the shot that wounded Sokolović and killed her son was fired by a member of the SRK from the Metalka Building.[479] The Prosecution submits that compelling evidence supports this finding, including: Sokolović's testimony, Exhibit P457, a video showing Divović's body filmed a short time after he was murdered, a police report, and testimony of witness Bešlić, who operated on Sokolović in 1994

[472] Defence Appeal Brief, para. 223.
[473] Defence Appeal Brief, paras 185 and 224.
[474] Defence Appeal Brief, para. 186.
[475] Defence Appeal Brief, para. 191.
[476] Defence Appeal Brief, para. 193.
[477] Defence Appeal Brief, para. 193.
[478] Defence Appeal Brief, para. 194.
[479] Prosecution Response Brief, para. 113.

after she was shot, and re-examined her in 2007.[480] The Prosecution submits that Milošević has failed to show any error in the Trial Chamber's assessment of the evidence and instead repeats his arguments presented at trial claiming that the Trial Chamber should have adopted a different interpretation of the evidence.[481]

170. The Prosecution further submits that the testimony of Prosecution expert witness Van der Weijden, as well as reports describing the shooting, establish that the shot came from SRK-controlled territory, specifically the Metalka Building, a known SRK sniper position.[482] It argues that this finding was supported by witness Van der Weijden's assessment that the Metalka Building offered "direct and clear views of the stretch between the Museum and the Faculty".[483] The Prosecution further submits that Milošević produces no evidence to substantiate his speculative claim that Divović's body, which was photographed on the pedestrian crossing, could have been moved, or that trees might have obstructed the view of the sniper on that date.[484]

(b) Analysis

171. The Appeals Chamber notes that the Trial Chamber concluded as follows

> There is no evidence indicating that the shots came from ABiH-held territory. The Trial Chamber finds the evidence of Lt. Van der Weijden convincing and concludes that the only reasonable inference to be drawn is that the shot that killed Nermin Divović and wounded Dženana Sokolović, both civilians, originated from the Metalka Building, a known SRK sniper position. In light of the fact that there is nothing in the evidence suggesting that the shot could have been fired by anyone other than a member of the SRK, the Trial Chamber concludes that the shots were fired by a member of the SRK.[485]

172. The Trial Chamber carefully considered and assessed evidence indicating the direction from which the shots originated.[486] It noted that witness Van der Weijden testified as to the direction of the shot and the location of the shooter.[487] In this regard, it pointed out that his report and other evidence showed that the shots came from the Metalka Building, located at the Franje Račkog

[480] Prosecution Response Brief, para. 114, referring to Dženana Sokolović, 22 Jan 2007, T. 797-797, T. 812; Šefik Bešlić, 3 Apr 2007, T. 4422-4423; Exhibits P941 (under seal); P457 (under seal); P271, D19.
[481] Prosecution Response Brief, para. 113.
[482] Prosecution Response Brief, para. 115.
[483] Prosecution Response Brief, para. 116.
[484] Prosecution Response Brief, para. 116.
[485] Trial Judgement, para. 341.
[486] Trial Judgement, paras 329-338.
[487] Trial Judgement, para. 329, referring to Exhibit P514, p. 23.

Street across the river.[488] According to witness Van der Weijden, his investigations showed that the shooter was at a distance of 312 metres from the victims.[489] He added that the rooms in the Metalka Building offered a direct and clear view of the area between the Museum and the Faculty of Philosophy.[490] Witness Van der Weijden was also of the opinion that there was no reason to mistake the victims for combatants as it would have been possible to identify Sokolović and her son as an adult and a child, even with the naked eye.[491] Thus, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude that the shots were fired from SRK-held territory and Milošević has not demonstrated an error in this regard.[492]

173. The Appeals Chamber further notes that the Trial Chamber accepted witness Van der Weijden's observations regarding the view that the Metalka Building had of the area where Sokolović and Divović were shot. While challenging this finding, Milošević does not point to any evidence suggesting that the area was in fact blocked by trees or otherwise obstructed at the relevant time. The mere fact that there was some vegetation at the time when witness Van der Weijden compiled his report does not, in itself, make his observation with respect to the visibility at the time of the crimes impossible or unlikely. Further, the Appeals Chamber notes that during its opening statement on 11 January 2007, the Prosecution pointed out that the situation of trees and vegetation was different in November 1994.[493] This argument was therefore before the Trial Chamber. The Appeals Chamber finds that Milošević has failed to show that the witness's description of this vantage point is one that no reasonable trier of fact would have accepted.

2. The victims' location at the moment of impact

(a) Arguments of the parties

174. Milošević submits that Sokolović's testimony indicates that her right side was turned towards Grbavica at the time of shooting. Her son, who had been on her left, changed the position

[488] Trial Judgement, para. 329, referring to Exhibits P514, p. 23; P515; D19, p. 1; P868; P583; P97; P222; P223; P166; P754; C14, pp. 14-18, 24-29; C3, pp. 12-20; P88; P941 (under seal); D79.
[489] Trial Judgement, para. 329, referring to Patrick Van der Weijden, 29 Mar 2007, T. 4278, 4283; Exhibits P514, pp. 23-24; P515.
[490] Trial judgement, para. 329, referring to Patrick Van der Weijden, 29 Mar 2007, T. 4279; Exhibits P514, pp. 23-24; P515; C14, pp. 14-18, 24-29; C3, pp. 12-20.
[491] Trial Judgement, para. 329, referring to Patrick Van der Weijden, 29 Mar 2007, T. 4277-4278; Exhibit P514, p. 24.
[492] See also *supra*, Section III.A.1, para. 22, regarding the articulation of the standard of proof.
[493] Prosecution Opening Statement, 11 Jan 2007, T. 290.

of his body with respect to Grbavica, as he had previously turned his head to talk to her.[494] Milošević points out that on the Sarajevo street map, the neighbourhood of Grbavica was on Sokolović's right side at that time.[495] Given that the right side of Sokolović was SRK-held territory, determining the spot where the bullet entered her abdomen, together with other indicia mentioned in this ground of appeal, is crucial to establishing Milošević's guilt beyond reasonable doubt.[496]

175. Milošević further argues that the Trial Chamber committed an error in finding that Sokolović indicated the place where she was located when the bullet hit her.[497] In this respect, he points out that she indicated the spot where her son fell, because she did not realise until later that she had been wounded.[498] Milošević argues that a photograph published the day after the incident in "Providence Journal-Bulletin" shows the child's body in a pool of blood on the pedestrian crossing, and that it is not possible to establish from the evidence in the case file whether his body was moved after the incident.[499]

176. The Prosecution submits that although some evidence put the victims "on" the pedestrian crossing and other evidence put them "before" the crossing, the Trial Chamber reasonably found that the sniper in the Metalka building could have targeted them at either location.[500] The Prosecution argues that the fact that Sokolović noticed her own wounds after her son was hit has no bearing on her testimony concerning both where he was killed and where she was wounded.[501] It adds that Milošević produces no evidence to substantiate this speculative claim that Divović's body could have been moved.[502]

(b) Analysis

177. The evidence shows that at the time of the incident Sokolović and her son were walking from the direction of Novo Sarajevo towards Bistrik.[503] The Appeals Chamber notes that the Trial

[494] Defence Appeal Brief, paras 195-196.
[495] Defence Appeal Brief, para. 197, referring to Exhibit P104.
[496] Defence Appeal Brief, para. 199.
[497] Defence Appeal Brief, para. 190.
[498] Defence Appeal Brief, para. 190, referring to Dženana Sokolović, 22 Jan 2007, T. 796 -798.
[499] Defence Appeal Brief, para. 190, referring to Exhibit P272.
[500] Prosecution Response Brief, para. 116, referring to the Trial Judgement, para. 339 and fn. 1209.
[501] Prosecution Response Brief, para. 116.
[502] Prosecution Response Brief, para. 116.
[503] Dženana Sokolović, 22 Jan 2007, T. 764-765. See also Trial Judgement, para. 327, stating that by the time when Sokolović and Divović were shot, they had walked past the Museum and were crossing Franje Račkog Street (referring to Dženana Sokolović, 22 Jan 2007, T. 785; John Jordan, 21 Feb 2007, T. 2651; Exhibits P271; P272).

Chamber considered various pieces of evidence regarding the victims' precise location at the moment of impact. It noted that Sokolović gave conflicting evidence about her location when she and her son were shot, but then explained the source of her confusion and confirmed that the precise location of the incident was shown in the investigation video, and was on the side-walk closer to the Museum.[504] Furthermore, to confirm the positions of the victims at the time of impact, the Trial Chamber considered the testimony of witness Jordan, the Criminal Investigation File, a video clip of the sniping incident, a photograph from the "Providence Journal-Bulletin", and a photograph marked by witness Jordan suggesting that Sokolović and her son were on the pedestrian crossing.[505] It also considered other evidence suggesting the victims were shot before the pedestrian crossing, such as a 360° photograph, a video clip with Sokolović, and a photograph marked by Sokolović.[506] On this basis, the Trial Chamber found that despite certain discrepancies in the evidence, it was clear from the report of expert witness Van der Weijden, and from photographic and video evidence, that a sniper located in the Metalka Building was in fact able to target the victims at both possible locations on Zmaja od Bosne Street.[507]

178. The Appeals Chamber agrees with Milošević that the Trial Chamber reached this finding without determining the precise location at which Sokolović and her son were hit. The Trial Chamber's approach shows that it refrained from making the exact determination due to discrepancies in the evidence. Instead, the Trial Chamber aimed at establishing whether shots could have been fired at both places from the Metalka Building. In so doing, it found beyond reasonable doubt that a sniper from the Metalka Building would have been able to shoot at the victims being at either location. Such an approach does not, in the present circumstances, render the finding in question invalid. In light of the discrepancies in the evidence, the Appeals Chamber appreciates the difficulties inherent in making a finding as to the precise location of the victims at the time of impact. The Appeals Chamber thus accepts that the ultimate conclusion of the Trial Chamber on this incident was reached beyond reasonable doubt on the totality of evidence and would not be affected if the exact location of these victims was established to be the side-walk or the pedestrian crossing.

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[504] Trial Judgement, para. 330, referring to Dženana Sokolović, 22 Jan 2007, T. 773-774, 784, 804-805; Exhibits P89; P941 (under seal), D18.
[505] John Jordan, 21 Feb 2007, T. 2651, 2666, 2671-2672, 2677; Exhibits D19, pp. 1, 3; D79; P271; P272.
[506] Exhibits P89; P941 (under seal); D18.
[507] Trial Judgement, para. 339, referring to Exhibits P514, p. 23; C14, pp. 14-18, 24-29; C3, pp. 12-20.

3. The direction of the shot

(a) Arguments of the parties

179. Milošević submits that the Trial Chamber erred, in the presence of conflicting evidence, in finding that Sokolović and Divović were shot from the right side to the left. He argues that a review of the evidence admitted by the Trial Chamber concerning the entry and exit wounds of the bullet through the bodies of Sokolović and Divović, as well as the order in which the victims were hit, provides "different determinations for indicia that is essential to draw conclusions about the direction from which the bullet was fired".[508] Milošević submits that the Trial Chamber does not clearly explain the reasons why it preferred certain evidence when it established the factors that allowed it to reach conclusions on the origin of fire and his guilt, respectively.[509] In this regard, he points out that had the Trial Chamber issued a reasoned opinion, it would have explained: (i) why it found that the Bosnian police report was probative with regard to Sokolović's wounds while it was not for Divović's; (ii) why Exhibit P457 was acceptable even though it is contradicted by the police report and by exhibits D271 and D272; and (iii) why witness Bešlić's testimony was more reliable than the medical report for Sokolović.[510]

180. Milošević argues that the Trial Chamber erred in relying on the evidence of witness Bešlić to find that Sokolović was hit on the right side of her body.[511] He points out that the Prosecution only took witness Bešlić's written statement after Sokolović had testified on 22 January 2007 and after Milošević had tendered Exhibit D19 into evidence challenging the origin of fire.[512] Milošević submits that the circumstances in which the Prosecution used witness Bešlić's testimony to contradict its own exhibit, which it had previously tendered and was authenticated by witness Nakaš, should have alerted a reasonable Trial Chamber to take all necessary precautions to assess the evidence and give it proper weight.[513] Milošević further argues that the Trial Chamber erred in finding the testimony of witness Bešlić to be corroborated by that of Sokolović. He asserts that Sokolović obtained the information about the direction from which the bullet passed through her

[508] Defence Appeal Brief, para. 206.
[509] Defence Appeal Brief, para. 207.
[510] Defence Appeal Brief, paras 207, 212-213.
[511] Defence Appeal Brief, para. 208.
[512] Defence Appeal Brief, para. 209.
[513] Defence Appeal Brief, para. 211, referring to Exhibits P107, P400 to P471 and *Kupreškić* Appeal Judgement, para. 31.

abdomen from the statements of others and in particular from Exhibit P941 tendered by the Prosecution.[514]

181. Milošević argues that a reasonable Trial Chamber would have relied on witness Bešlić's acceptance that "it was the bullet's passage next to the liver that brought on the contusion and not the entrance of the bullet on the right side of the body."[515] Milošević further submits that the testimony of witness Bešlić is based solely on the results of an examination of the position and appearance of the scars left on Sokolović's body, conducted 12 years after the incident and without taking any photographs of the scars.[516] Milošević adds that even if witness Bešlić expressed no doubts in his written statement, he admitted during his appearance before the Trial Chamber that after more than 12 years, deformations of the scars were possible.[517] He points out that expert witness Milosavljević, a medical examiner, testified before the Trial Chamber about the poor probative value of scars when describing a wound.[518] Accordingly, Milošević submits that no reasonable Trial Chamber could have found that it had been established beyond reasonable doubt, based on witness Bešlić's testimony, that Sokolović was hit on the right side of her body and that the bullet passed through her abdomen and exited on the left side.[519]

182. Regarding Divović, Milošević submits that the Trial Chamber rightly noted, after analysing the video and the photograph of the incident, that Divović has wounds not on his left cheek, but on his right cheek. However, he argues that the Trial Chamber disregarded the fact that the wound on Divović's cheek is much larger than that on the back of his neck.[520] Applying the distinction made by witness Bešlić, Milošević submits that contrary to what was written in the autopsy report, the video and the photograph of the incident prove that the entry wound was on the left side of the boy's neck and the exit wound was on the right cheek.[521] Milošević also submits that provided that the body was not moved after the incident, the video and the photograph prove that Divović fell forward, which, owing to his small stature and the speed and force of the bullet, means that the

[514] Defence Appeal Brief, para. 214, referring to the Trial Judgement, para. 330.
[515] Defence Appeal Brief, para. 216.
[516] Defence Appeal Brief, para. 217.
[517] Defence Appeal Brief, para. 218.
[518] Defence Appeal Brief, para. 218.
[519] Defence Appeal Brief, para. 219.
[520] Defence Appeal Brief, para. 222.
[521] Defence Appeal Brief, para. 222.

bullet hit him from behind.[522] Finally, Milošević argues that the Prosecution improperly proofed Sokolović prior to her appearance before the Trial Chamber.[523]

183. The Prosecution argues that Milošević ignores the Trial Chamber's detailed explanation as to how and why it determined that the victims had been shot from the right side.[524] The Prosecution points to witness Bešlić's testimony that the entry in the medical record stating that Sokolović was shot from the left side was a mistake made by a young doctor with a large and hectic case load and was inconsistent with witness Bešlić's 2007 medical examination of Sokolović.[525] Although Sokolović stated that she had been shot from her left, she admitted to being confused generally about her left and right side, and the Trial Chamber noted that she consistently pointed to her right side when asked to demonstrate where on her body she had been struck.[526] The Prosecution further argues that Milosavljević reviewed only a small number of medical records, failed to examine Sokolović, and failed to consult either Bešlić or the forensic pathologist who conducted Divović's autopsy.[527] It asserts that Exhibit D19, a criminal investigation file, was rejected because it was contradicted by both Exhibit P457 and the video taken at the scene.[528]

184. The Prosecution further submits that the video and photographic evidence taken at the scene shortly after the shooting do not provide a clear view that could be used to determine the entry and exit points, nor can the fact that Didović was depicted lying on his front prove that he was hit from behind.[529] It finally submits that there is no basis for Milošević to suggest that Sokolović was improperly coached during her proofing session.[530]

(b) Analysis

185. At the outset, concerning Milošević's claim that the Prosecution improperly proofed Sokolović prior to her appearance before the Trial Chamber, the Appeals Chamber notes that

[522] Defence Appeal Brief, para. 222.
[523] Defence Appeal Brief, paras 202, 214.
[524] Prosecution Response Brief, para. 117.
[525] Prosecution Response Brief, para. 117, referring to Exhibit P456 (under seal).
[526] Prosecution Response Brief, para. 117, referring to Dženana Sokolović, 22 Jan 2007, T. 772, 795, 797-798, 812; Exhibit P941 (under seal).
[527] Prosecution Response Brief, para. 117, referring to Ivica Milosavljević, 27 Aug 2007, T. 9281-9282 and T. 9288-9290.
[528] Prosecution Response Brief, para. 117, referring to the Trial Judgement, para. 336.
[529] Prosecution Response Brief, para. 118.
[530] Prosecution Response Brief, para. 119.

Milošević fails to adduce any argument to substantiate his allegation. Accordingly, the Appeals Chamber will not entertain his challenge in this respect.

186. As to the side from which Sokolović and Divović were shot, the Trial Chamber considered the following

> The Defence, during cross-examination and in the presentation of its evidence, drew attention to the entry and exit wounds of both victims. It submitted that the shots could have originated from ABiH-held territory. According to the medical records of Dženana Sokolović, the entry wound was on the *left* side and the exit wound on the *right* side. Šefik Bešlić, the doctor who performed the operation on Dženana Sokolović, explained that the information in the medical record that the entry wound was on the "paramedian left" and the exit wound to the "paramedian right" was a mistake made by the doctor who wrote the notes. Šefik Bešlić also explained that the hospital had large numbers of patients, and it was mainly the young doctors who noted down the information. The doctors may have looked at two or three patients at a time and then written down information; it was then that this particular doctor might have "switched" the sides in this report. He explained that the correct information was always obtained by looking at the patient.[531]
>
> […]
>
> Nermin Divović was killed by a bullet that entered from the right-hand side of his cheek and exited on the left-hand side of his neck. He was not very tall; his head reached Dženana Sokolović's waist. The Defence tendered a criminal investigation file indicating that the entry wound was at the back of Nermin Divović's head, above the right ear and that the exit wound was on the face, below the left eye. However, this evidence is neither supported by the Record of Autopsy on Nermin Divović nor by the video evidence showing the boy shortly after he was shot.[532]

187. The Trial Chamber also noted the evidence of witness Milosavljević, expert on forensic medicine, to the effect that the angle of the shot was from below upwards, and from left to right.[533] However, it recalled that in cross-examination, when confronted by the Prosecution, witness Milosavljević conceded that he only reviewed the medical documentation provided to the police investigation file and that he had not been provided with a statement by witness Bešlić. Furthermore, witness Milosavljević had not tried to contact witness Bešlić or the forensic pathologist who conducted the autopsy of Divović and he had not examined the victims.[534] The

[531] Trial Judgement, para. 332 (footnotes omitted), referring to Exhibit P456 (under seal), p. 3; Bakir Nakaš, 25 Jan 2007, T. 1087; Šefik Bešlić, 3 Apr 2007, T. 4419-4420, 4425-4427, 4429, 4436.
[532] Trial Judgement, para, 336 (footnotes omitted), referring to Exhibits P271; P457 (under seal), p. 1, and D19; Bakir Nakaš, 25 Jan 2007, T. 1085; Dženana Sokolović, 22 Jan 2007, T. 786.
[533] Trial Judgement, para. 337.
[534] Trial Judgement, para. 338.

Appeals Chamber thus finds that the Trial Chamber fully considered and weighed all the evidence presented prior to determining the side from which the victims were hit.

188. With respect to Milošević's argument that no reasoned opinion was given as to why the Trial Chamber found that the Bosnian Police criminal investigation file was probative with regard to Sokolović's wounds while it was not for Divović's, the Appeals Chamber notes that the Trial Chamber explicitly observed Milošević's submissions suggesting that Divović was shot before Sokolović,[535] and referred to evidence supporting that claim, notably the criminal investigation file.[536] The Trial Chamber concluded by pointing out that this submission was based on incorrect information, as "[t]he video taken immediately after the incident also show[ed] that the locations of the entry and exit wounds on Nermin Divović were accurately described in Nermin Divović's autopsy report, and not in the criminal investigation file."[537] Accordingly, the Trial Chamber clearly explained why the criminal investigation file was not probative with regard to Divović. In the Appeals Chamber's view, Milošević has not demonstrated that the Trial Chamber failed to give a reasoned opinion in this respect.

189. Regarding Exhibits P271 and P272, the Appeals Chamber notes that the former is a video-clip of the sniping incident, and the latter is a photograph from the "Providence Journal – Bulletin". The Trial Chamber considered these exhibits in determining the location of Sokolović and Divović at the point of impact and not the size of Divović's wounds.[538] In this regard, the Appeals Chamber notes that contrary to Milošević's assertion that the wound on the cheek was larger than the one on the neck, both images are rather unclear and it would be unreasonable to use them for establishing the size of the entry and exit wounds. Milošević thus fails to demonstrate how these exhibits contradicted the autopsy report with regard to the side from which Divović was shot.

190. In relation to the evidence of witness Bešlić, the Trial Chamber found as follows

> The testimony of both Dženana Sokolović and Šefik Bešlić was that the bullet entered from the right side of Dženana Sokolović's body and exited on the left side. Šefik Bešlić testified that, based on his experience with gun-shot victims, a review of the medical documentation of her injuries and his own recent physical examination of her, the entry wound was on the right side and the exit wound was on the left side of her body. He explained that an entry wound is smaller than an exit wound and that Dženana Sokolović's wound on her left side was larger than the wound on the right side, thus indicating that the projectile exited her body on

[535] Trial Judgement, para. 335.
[536] Trial Judgement, para. 336.
[537] Trial Judgement, para. 340.
[538] Trial Judgement, fns. 1154, 1155, 1159 and 1209.

> the left side and that the projectile travelled from her right to her left side. The scars of Dženana Sokolović were typical of scars resulting from injuries sustained by a bullet. The Defence asked whether it was possible that the scars on her body had been altered. He replied that there would be a possibility that she had surgery on the scars, but he dismissed the possibility that a surgeon would create a scar resembling an exit wound.[539]

191. The Appeals Chamber reiterates that the Trial Chamber took into account various evidence prior to making its determination regarding the side on which Sokolović and Divović were hit. The Trial Chamber considered the evidence of witnesses Sokolović and Bešlić, confirming that Sokolović was struck from the right side and that the exit wound was on the left side of her body.[540] Furthermore, the Appeals Chamber recalls that witness Bešlić performed an operation on Sokolović on 18 November 1994 after she had been shot, at which time he recorded his operational findings.[541] Witness Bešlić also physically examined Sokolović on 30 January 2007.[542] He explained the origin of the error in the medical records made at the time of the operation[543] and further testified that during the examination in 2007 he "established and confirmed the findings included in [his] operation findings at the time, […] that the bullet entered on the right side and exited on the left side".[544] It is therefore clear that witness Bešlić did not base his findings solely on the results of the 2007 examination of Sokolović.

192. In addition, the Appeals Chamber finds that Milošević failed to demonstrate how the absence of photographs of the scar or the omission to consider the impact of the bullet passing next to the liver rendered the Trial Chamber's findings erroneous. With regard to Milošević's reference to witness Bešlić's testimony concerning possible alterations in scars shape with time, the Appeals Chamber notes that witness Bešlić also pointed out that another operation would have been necessary for that to happen in this case.[545] Milošević fails to point to any evidence suggesting that Sokolović could have had another operation on the same area of the body. The Appeals Chamber thus finds that Milošević has failed to demonstrate that no reasonable trier of fact would have found that witness Bešlić's testimony supported the conclusion that Sokolović was hit on the right side of her body and that the bullet exited on the left side.

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[539] Trial Judgement, para. 333 (footnotes omitted).
[540] Trial Judgement, para. 333, referring to Šefik Bešlić, 3 Apr 2007, T. 4419-4420, 4422-4423; Dženana Sokolović, 22 Jan 2007, T. 797, 807, 812; Exhibits P521, p. 2; D19, p. 4; P941 (under seal).
[541] Trial Judgement, para. 332; Šefik Bešlić, 3 Apr 2007, T. 4418-4419, 4421.
[542] Šefik Bešlić, 3 Apr 2007, T. 4419, 4422.
[543] Trial Judgement, para. 332, referring to Šefik Bešlić, 3 Apr 2007, T. 4426.
[544] Šefik Bešlić, 3 Apr 2007, T. 4423.
[545] Šefik Bešlić, 3 Apr 2007, T. 4437.

193. For the foregoing reasons, the third sub-ground of appeal is dismissed in its entirety.

D. Incidents in Sedrenik

1. Arguments of the parties

194. Under his fourth sub-ground, Milošević contends that the Trial Chamber erred in finding that Sanela Dedović, Derviša Selmanović, and Tarik Žunić, three civilians, were deliberately targeted and hit by SRK members while they were in Sedrenik.[546] He submits that in order to make such conclusions, the Trial Chamber should have determined beyond reasonable doubt the location and position of these persons at the moment of impact as compared to possible sources of fire and the entry and exit wounds of the bullets in the bodies of the alleged victims.[547]

195. Milošević further submits that the Trial Chamber erred in finding that Selmanović was a civilian despite her being a member of the ABiH.[548] He submits that a report compiled by UNMO[549] was the only one of four reports compiled by international representatives to contain detailed notes indicating that on 10 December 1994 the sector of Špicasta Stjena was very active, that the origin of fire was unknown, and that a woman, referred to as a civilian, was allegedly wounded at Sedrenik.[550]

196. The Prosecution submits that the Trial Chamber duly considered Selmanović's employment with the ABiH and reasonably found that, as an "unarmed cook", she was a civilian.[551] It submits that although Milošević refers to evidence, he does not substantiate his argument or raise any specific allegation of error. The Prosecution also submits that the substance of this sub-ground of appeal only deals with the 10 December 1994 wounding of Selmanović and that the unexplained challenges to paragraphs 354 and 378 of the Trial Judgement should be summarily dismissed.[552]

[546] Defence Appeal Brief, para. 225.
[547] Defence Appeal Brief, para. 226.
[548] Defence Appeal Brief, para. 228.
[549] Defence Appeal Brief, para. 229, referring to Exhibit P826.
[550] Defence Appeal Brief, para. 229.
[551] Prosecution Response Brief, para. 120, referring to Trial Judgement, para. 365.
[552] Prosecution Response Brief, para. 121.

2. Analysis

197. The Trial Chamber found that three sniping incidents took place in Sedrenik,[553] noting that the ridge of Špicasta Stijena was held by the SRK and that ABiH forces were positioned in trenches at Grdonj and at the foot of Špicasta Stijena.[554] It held that Sedrenik was an area with a civilian population and that three victims of sniping incidents, Dedović, Selmanović, and Žunić, were civilians hit by SRK snipers positioned on the ridge of Špicasta Stijena.[555]

198. As analysed above, the Trial Chamber explained that the term "civilian" is defined negatively to include any person who is *not* a member of the armed forces or an organised military group belonging to a party to the conflict.[556] It also noted that in some circumstances, it may be difficult to ascertain whether a person is a civilian.[557] The Trial Chamber further pointed out that the generally accepted practice is that combatants distinguish themselves by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly.[558] It added that other factors that may help determine whether a person is a civilian include his or her clothing, activity, age, or sex.[559] As a matter of principle, the Appeals Chamber can discern no error in such an approach.

199. Concerning the civilian status of Selmanović, witness Đozo testified that she was not "a member of the B[i]H army".[560] In its factual findings, the Trial Chamber accepted Selmanović's evidence that she was not wearing a uniform and that she was always dressed in civilian clothing.[561] It found that the distinction in dress would have been obvious to an SRK shooter who had optical devices, especially since at the time of the shooting, Selmanović was gathering firewood in a private garden and was unarmed.[562] The Appeals Chamber notes that at trial Milošević argued that Selmanović did not have civilian status on account of her membership in the ABiH.[563] This argument was duly noted and considered by the Trial Chamber in the Trial Judgement.[564] The Trial Chamber found that Selmanović, as an unarmed cook, was a person accompanying the BiH armed

[553] Trial Judgement, para. 342.
[554] Trial Judgement, para. 342.
[555] Trial Judgement, paras 342, 354, 364, 378 and 901.
[556] See *supra,* Section III.C.1.(b)(i), para. 50 and fn. 142.
[557] Trial Judgement, para. 945.
[558] Trial Judgement, para. 946, referring to Article 44 (7) Additional Protocol I; *Galić* Trial Judgement, para. 50.
[559] Trial Judgement, para. 946, referring to *Galić* Trial Judgement, para. 50.
[560] Trial Judgement, para. 362, referring to Nedžib Đozo, 14 Mar 2007, T. 3703.
[561] Trial Judgement, para. 365.
[562] Trial Judgement, para. 365.
[563] Defence Closing Arguments, 10 Oct 2007, T. 9531-9532.

forces without actually being a member thereof, in the sense of Article 4(A)(4) of the Third Geneva Convention. She was therefore to be considered a civilian, according to the negative definition contained in Article 50(1) of Additional Protocol I.[565] Milošević has not demonstrated any error in this regard.

200. Regarding Milošević's contention that the Trial Chamber should have determined beyond reasonable doubt the location and positions of Dedović, Selmanović, and Žunić at the moment of impact, the Appeals Chamber considers that he neither identifies a specific error nor provides any clear arguments demonstrating an error of fact or law on the part of the Trial Chamber. In particular, he does not demonstrate that had the Trial Chamber explicitly established all those factors, it would have come to a different conclusion regarding the fact that these victims were shot by a member of the SRK. Therefore, these contentions are dismissed without further analysis.

201. For the foregoing reasons, the fourth sub-ground of appeal is dismissed in its entirety.

E. Incident of 24 October 1994

1. Arguments of the parties

202. Under his fifth sub-ground, Milošević submits that the Trial Chamber erred in concluding that SRK members posted in the School of the Blind in Nedarići shot at Adnan Kasapović and his friends on 24 October 1994.[566] He first contends that in order to make these findings, the Trial Chamber should have considered and established beyond reasonable doubt the location and position of these persons at the moment of impact with respect to the possible sources of fire, as well as the entry and exit wounds of the bullet that allegedly penetrated the victim's body.[567] Milošević submits that the only issues that can be determined in this instance are the part of Kasapović's body where the bullet fatally wounded him and the direction of its movement. He submits that the Trial Chamber should not have excluded the possibility of a stray bullet or a ricochet.[568] Furthermore, Milošević submits that one of Kasapović's companions, witness W-62, did not explain why he was on the first front-line with Kasapović at that time.[569] As a result, he submits that because it was known that young boys bore arms at the time, one of the reasonably possible conclusions "would be

[564] Trial Judgement, para. 365.
[565] Trial Judgement, para. 366.
[566] Defence Appeal Brief, para. 230.
[567] Defence Appeal Brief, para. 230.
[568] Defence Appeal Brief, para. 231.
[569] Defence Appeal Brief, para. 233.

that the three boys were on guard as members of the ABiH and when they were passing by the passage in the vicinity of Vemex they were spotted by SRK members and legally targeted as military objectives".[570]

203. The Prosecution submits that the Trial Chamber reasonably found that Kasapović was killed by an SRK sniper and that Milošević has failed to demonstrate that no reasonable Trial Chamber could have reached the same finding.[571] It further argues that Milošević fails to show how the consideration of the location of the wound and the direction of the victim's path would have any effect on the ultimate findings reached by the Trial Chamber.[572] The Prosecution submits that it is clear from the Trial Chamber's discussion of direct lines of sight, visibility, and optical range that the targeting was intentional and not a ricochet or a stray bullet.[573] Finally, the Prosecution contends that the Trial Chamber reasonably rejected Milošević's argument that Kasapović and his friends could have been legitimately mistaken for combatants. According to the Prosecution, the evidence shows that (i) there was no military activity in the area on that day, (ii) the boys were wearing civilian clothes, (iii) they were in a passageway that was not used by soldiers, and (iv) the sniper had a clear view of the targets.[574]

2. Analysis

204. The Trial Chamber found that on 24 October 1994, Kasapović, a 14 year old civilian, was shot and killed when walking by a passage-way in Vojničko Polje. It found that there is no evidence suggesting that the shot originated from the ABiH-held territory and noted that there was evidence from eyewitnesses and the Prosecution expert witness Van der Weijden showing that the shots came from the School of the Blind, a known SRK sniper location. It therefore concluded that the shots were fired by a member of the SRK.[575]

205. Based on the evidence of witnesses W-62, Van der Weijden and Stamenov, the Trial Chamber found that there was a direct line of sight from the School of the Blind to the passageway.[576] Witness T-52, who was posted at the School of the Blind, did not deny that SRK

[570] Defence Appeal Brief, para. 234.
[571] Prosecution Response Brief, para. 122.
[572] Prosecution Response Brief, para. 123.
[573] Prosecution Response Brief, paras 123-124, referring to the Trial Judgement, paras 205, 393-396.
[574] Prosecution Response Brief, para. 126, referring to the Trial Judgement, paras 380, 382, 395.
[575] Trial Judgement, para. 393.
[576] Trial Judgement, para. 395.

soldiers at times went to the upper floors of the School of the Blind.[577] On this basis, and having found that the evidence that SRK soldiers never fired shots from that position was not credible, the Trial Chamber concluded that a sniper in the School of the Blind, particularly with the benefit of telescopic sights, had a clear view of Kasapović.[578] Further, the Appeals Chamber notes that witness Stamenov's testimony actually confirms that the medical record of the entry and exit wound would not be decisive in this case given that the trajectory of a bullet through a body can change.[579] Milošević has thus failed to demonstrate any error concerning the Trial Chamber's conclusion based on the totality of the evidence that the shot was fired by a member of the SRK.

206. With regard to the possibility that the victims could have been mistaken for members of the ABiH, an argument raised by Milošević at trial and reiterated on appeal,[580] the Trial Chamber noted that (i) the victims were young boys dressed in civilian clothes;[581] (ii) there was no military activity in the area that day;[582] (iii) the passageway was not used by ABiH soldiers;[583] (iv) the weather conditions were good;[584] and (v) the distance from which Kasapović was shot would have allowed for the sniper to determine whether he was carrying arms or was a combatant.[585] Milošević does not present any clear challenge to any of these conclusions or the underlying evidence.

207. Finally, as regards Milošević's argument concerning Kasapović's birthday,[586] the Appeals Chamber notes that the Trial Chamber cited witness W-62, who stated that Kasapović was shot on the day of his birthday, 24 October 1994.[587] However, the Appeals Chamber also notes that the expert report of witness Van der Weijden erroneously states, with reference to "witness reports provided by ICTY", that Kasapović was born on 14 January 1978.[588] Despite this confusion, the Trial Chamber correctly relied on witness W-62's testimony that it was Kasapović's birthday when he was shot.[589] That said, the Appeals Chamber finds that the Trial Chamber erred in stating that

[577] Trial Judgement, para. 395.
[578] Trial Judgement, para. 395.
[579] Trial Judgement, para. 397.
[580] Defence Final Brief, para. 181; Defence Appeal Brief, para. 234.
[581] Trial Judgement, para. 380, referring to W-62, 23 Jan 2007, T. 889; Exhibit P514, p. 13.
[582] Trial Judgement, para. 380, referring to W-62, 23 Jan 2007, T. 889 and 24 Jan 2007, T. 924.
[583] Trial Judgement, para. 382, referring to W-62, 23 Jan 2007, T. 889 and 24 Jan 2007, T. 924.
[584] Trial Judgement, para. 389, referring to W-62, 23 Jan 2007, T. 890.
[585] Trial Judgement, para. 390, referring to Exhibit P514, p. 13.
[586] Defence Appeal Brief, paras 232-233.
[587] Trial Judgement, para. 380, referring to W-62, 23 Jan 2007, T. 888-889.
[588] Exhibit P514, p. 12.
[589] See, *e.g.*, W-62, 23 Jan 2007, T. 880, line 18 (redacted from open session transcript).

the victim of this incident was 14 years old at the time[590] because, given that he was born in 1978, he must have been turning 16 in 1994.[591] The Appeals Chamber recognizes the errors and the confusion about the victim's exact age, but finds that they are without impact on either W-62's credibility or the Trial Chamber's conclusion that Kasapović was a young unarmed civilian who could not be mistaken for a combatant by the sniper.

208. In view of the foregoing, this sub-ground is dismissed.

F. Conclusion

209. In light of the above conclusions, Milošević's seventh ground of appeal is dismissed in its entirety.

[590] Trial Judgement, paras 380, 393.
[591] *Cf.* Exhibit P514, p. 10: "Adnan Kasapović, a boy of sixteen, was with friends close to the Vemex department store […]" but p. 12: "The victim was 15 years of age at the time of his death according to his date of birth of 14-01-1978".

IX. ALLEGED ERRORS IN FINDINGS THAT MEMBERS OF THE SRK WERE BEHIND SPECIFIC MORTAR SHELLING INCIDENTS (MILOŠEVIĆ'S EIGHTH GROUND OF APPEAL)

210. The Trial Chamber found that the SRK was responsible for several incidents of shelling civilians and civilian areas in Sarajevo, which resulted in the death or injury of numerous civilians.[592] Under his eighth ground of appeal, Milošević challenges the Trial Chamber's finding that the SRK was behind the shelling of Livanjska street on 8 November 1994, the shelling of the Baščaršija flea market on 22 December 1994, and the shelling of the Markale Market on 28 August 1995. Milošević structures this ground of appeal in three sub-grounds.

A. Incident of 8 November 1994

211. The Trial Chamber found that on the afternoon of 8 November 1994, three shells exploded on Livanjska Street, Centar Municipality, Sarajevo.[593] Based on testimonial and documentary evidence, the Trial Chamber reached the conclusion that the three shells were launched from SRK-held territory by members of the SRK.[594] The Trial Chamber found that, as a result of the shelling, "at least four civilians were killed and six civilians were seriously injured".[595]

1. Arguments of the parties

212. Under his first sub-ground of appeal, Milošević challenges the Trial Chamber's finding that the second and third shells were fired from SRK-held territory. He submits that the Trial Chamber erroneously relied on the uncorroborated evidence of witness Sabljića[596] to reconcile the contradictions involving the different reports on this incident.[597] Milošević argues that the Trial Chamber should have found him innocent in light of the circumstances surrounding the investigations mentioned at paragraph 450 of the Trial Judgement, as well as in light of witness

[592] Trial Judgement, paras 443, 464, 473, 495, 508, 521, 533, 539, 552, 561, 623, 640, 652, 669, 724, 796.
[593] Trial Judgement, para. 462.
[594] Trial Judgement, paras 463-464.
[595] Trial Judgement, para. 465.
[596] Defence Appeal Brief, paras 236-237. Milošević refers to Mirza Sabljića as witness W- 114. Witness Sabljića was only granted the protective measure of face distortion, so his name can be, and was indeed, referred to during trial. (Decision on Prosecution's Motion for Protective Measures, 12 February 2007, para. 19; see also 19 Apr 2007, T. 4693).
[597] Defence Appeal Brief, para. 235. Milošević points to the different investigation reports tendered into evidence as Exhibits P378 (under seal), D84, D85, and P578 (Defence Appeal Brief, para. 238).

Higgs's testimony set out at paragraph 459 of the Trial Judgement.[598] Milošević does not appear to contest the Trial Chamber's findings regarding the first shell.

213. The Prosecution responds that the Trial Chamber considered the totality of the evidence and reasonably concluded that the second and third shells were fired from SRK-held territory in the north-east.[599] It contends that the Trial Chamber was entitled to rely on the uncorroborated evidence of witness Sabljića, who explained that the UNPROFOR's assessment was erroneous in relying on Finnish firing tables instead of the ones produced in the former Yugoslavia.[600] The Prosecution submits that Milošević merely revisits evidence already considered at trial, failing to show how the Trial Chamber reached an unreasonable conclusion.[601]

2. Analysis

214. The Trial Chamber noted that both the KDZ and the UNPROFOR conducted independent investigations into the shelling incidents in Livanjska Street,[602] and that their reports differed as to the precise direction of fire of the second and third shells that hit Livanjska Street.[603] The Trial Chamber relied on witness Sabljića's testimony that the UNPROFOR investigators had erroneously relied on Finnish mortar tables, as well as on the conclusions reached by the BiH police and witness Higgs to find that the fire came from SRK-held territory.[604] The Trial Chamber reached those conclusions after having considered Milošević's arguments regarding the said inconsistencies.[605]

215. Milošević challenges witness Sabljića's testimony on the sole basis that it lacked corroboration. Contrary to this suggestion, nothing prohibits a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony.[606] Milošević has not presented any argument as to why relying on this evidence was

[598] Defence Appeal Brief, para. 238.
[599] Prosecution Response Brief, para. 129.
[600] Prosecution Response Brief, para. 129.
[601] Prosecution Response Brief, para. 129.
[602] Trial Judgement, para. 456.
[603] Trial Judgement, para. 456.
[604] Trial Judgement, para. 464.
[605] Trial Judgement, para. 456, referring to Defence Final Brief, para. 190. See also, Trial Judgement, para. 458, referring to Mirza Sabljića, 19 Apr 2007, T. 4729, 4775-4776 and Trial Judgement, para. 460, referring to Exhibit D84, p. 3.
[606] See, *e.g.*, *Aleksovski* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras 49, 101, 120, 159 and 207; *Nahimana et al.* Appeal Judgement, paras 633 and 810; *Gacumbitsi* Appeal Judgement, para. 72; *Kajelijeli* Appeal Judgement, para. 170, citing *Niyitegeka* Appeal Judgement,

unreasonable in this case. The Appeals Chamber therefore declines to further consider Milošević's unsubstantiated assertions on this point. In any case, the Trial Chamber was also satisfied that other evidence on the record supported the same conclusion.[607]

216. Milošević further challenges the Trial Chamber's determination of the origin of fire by referring, without elaboration, to paragraphs 450 and 459 of the Trial Judgement. The former concerns the investigation into the explosion of the first shell, recounting the evidence of witness Mujezinović, who testified that one of the UNPROFOR investigators was prevented by the BiH police from removing the tail-fin of the first shell from the ground.[608] The UNPROFOR investigators claimed to have been denied access and only returned the following day to the site of the impact of the first shell.[609] The Appeals Chamber notes that the Trial Chamber's finding that the first shell was fired from the SRK-held territory is not contested on appeal. Furthermore, Milošević has not provided any argument as to why the circumstances surrounding the investigation into the first shell could affect the Trial Chamber's findings on the origin of fire of the second and third shell. The Trial Chamber found that "[t]he investigations by the KDZ and UNPROFOR into the second and third shells were conducted simultaneously"[610] on 9 November 1994, which implies that the UNPROFOR did not face any difficulties when carrying out its investigations into these incidents. The Appeals Chamber finds that Milošević has not shown any error on the Trial Chamber's part on this point.

217. With respect to paragraph 459 of the Trial Judgement, the Appeals Chamber dismisses Milošević's assertion that in light of witness Higgs's testimony the Trial Chamber should have found him innocent.[611] Since Milošević has failed to elaborate this argument, the Appeals Chamber can only assume that he intended to point to witness Higgs's statement that the "'most logical position' from which the second and third shells were fired was in territory held by the SRK", but that "he could not categorically rule out the possibility that the shell came from ABiH-held

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para. 92; *Rutaganda* Appeal Judgement, para. 29; *Musema* Appeal Judgement, para. 36. See also *infra*, Section X.B.2, para. 248.

[607] Trial Judgement, para. 460, referring to W-91, 14 Mar 2007, T. 3734, 3748; See also, Richard Higgs, 24 Apr 2007, T. 5038-5039.

[608] Trial Judgement, para. 450, referring to Fikret Mujezinović, 27 Feb 2007, T. 2799-2800. See also Fikret Mujezinović, 27 Feb 2007, T. 2809.

[609] Trial Judgement, para. 450, referring to Fikret Mujezinović, 27 Feb 2007, T. 2815-2816; W-91, 14 Mar 2007, T. 3754.

[610] Trial Judgement, para. 456, referring to W-91, 15 Mar 2007, T. 3790 (private session).

[611] Defence Appeal Brief, para. 238.

territory".[612] A review of the Trial Judgement reveals that the Trial Chamber did not rely exclusively on the BiH police investigation report and the evidence of witness Higgs to find that the second and third shells were fired from SRK-held territory.[613] Rather, the Trial Chamber noted that both the BiH police and the UNPROFOR determined that the *direction* of fire of the second and third shell was north-east.[614] It further noted that, besides witness Higgs, witnesses Sabljića and W-91 also testified that the *origin* of fire was in the SRK-held territory.[615]

3. Conclusion

218. For the foregoing reasons, this sub-ground of appeal is dismissed.

B. Incident of 22 December 1994

1. Arguments of the parties

219. Under his second sub-ground of appeal, Milošević submits that the Trial Chamber erred in finding that the two shells that exploded at the Baščaršija flea market on 22 December 1994 had been fired by members of the SRK from the SRK-held territory.[616] He avers that the Trial Chamber failed to determine the factors that the Appeals Chamber had previously considered relevant in order to establish the direction from which a shell is fired, including the bearing, angle of descent, and the charge of the shell.[617]

220. With respect to the origin of fire, Milošević contends that the Trial Chamber noted discrepancies in the evidence regarding the type and calibre of the shells.[618] While the Bosnian police reported that the shells were fired from a 76 mm gun, UNMO referred to an 82 mm mortar shells.[619] Milošević submits that the Trial Chamber failed to adequately consider the consequences of this discrepancy and failed to determine the type and calibre of the projectile beyond reasonable

[612] Trial Judgement, para. 459, citing Richard Higgs, 24 Apr 2007, T. 5044, 5100-5103.
[613] Trial Judgement, para. 464.
[614] Trial Judgement, para. 460.
[615] Trial Judgement, para. 460.
[616] Defence Appeal Brief, paras 260-261.
[617] Defence Appeal Brief, paras 243 and 249, referring to *Galić* Appeal Judgement, paras 318, 330.
See also Defence Appeal Brief, para. 250.
[618] Defence Appeal Brief, para. 244.
[619] Defence Appeal Brief, para. 244.

doubt.[620] Milošević submits that the type of projectile is an element that makes it possible to eliminate certain locations as the origin of fire.[621] In support of this contention, he points to the report of expert witness Garović, which states that an 82 mm mortar and a 76 mm gun have different maximum firing ranges, with 8,860 m for the gun,[622] and between 471 m and 4,850 m for the 82 mm mortar.[623] He further argues that there was no evidence determining the shell's angle of descent.[624]

221. Milošević points to Exhibit D102, a map marked by witness Suljević, then KDZ pyrotechnics inspector in charge of analysing forensic evidence collected at crime sites. In Milošević's view, the said exhibit reflects that Čolina Kapa and Mala Čolina Kapa, areas under ABiH control, were very close to a line marked from Baščaršija towards the south-east.[625] Even if the Trial Chamber had legitimately established the direction of fire beyond reasonable doubt, he suggests, it would have needed to determine the charge of the projectile in order to establish the exact distance between the point of impact and the point of the origin of the fire and thus exclude that the fire came from the ABiH-held territory Čolina Kapa. In Milošević's view, only such logic would have allowed the Trial Chamber to find beyond reasonable doubt that the fire indeed originated from SRK-held territory.[626]

222. With regard to the direction of fire, Milošević claims that the Trial Chamber simply accepted the conclusions of the Bosnian police that were similar to those of the UNMO, even

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[620] Defence Appeal Brief, paras 244-246. Milošević submits that the Trial Chamber seems to have approved of the reasoning of the BiH police who, due to the lack of tail-fin, concluded that the shells had been shot from a gun and not from an 82 mm mortar. In Milošević's view, the absence of tailfin could however also lead to the conclusion that it was an explosive device set off in static conditions (Defence Appeal Brief, para. 246).
[621] Defence Appeal Brief, para. 245.
[622] Milošević erroneously refers to 8,860 mm instead of 8,860 metres.
[623] Defence Appeal Brief, para. 245.
[624] Defence Appeal Brief, para. 248.
[625] Defence Appeal Brief, para. 251. See also, AT. 83. In response to the Appeals Chamber's question to the parties communicated by the *Addendum* to the Order Scheduling the Appeals Hearing, 6 July 2009, p. 3, para. 4, Milošević also referred to Exhibits D110, D417 and the following witness testimonies: W-12, 1 Mar 2007, T. 3039, 3042, and 2 Mar 2007, T. 3065; Huso Palo, 5 Feb 2007, T. 1545-1546; Thomas Knustad, 13 Feb 2007, T. 2025-2026; Vahid Karavelić, 28 Mar 2007, T. 4228; Predrag Trapara, 27 Jun 2007, T. 7373-7374. In his submissions, this evidence is likely to show that the shell came from the positions held by the ABiH. Regarding Zoran Trapara's testimony, the Appeals Chamber understands that Milošević meant to refer to 26 Jun 2007, T. 7301-7302 and not T.7361-7362.
[626] Defence Appeal Brief, para. 251. See also, AT. 125-126.

though they were inconclusive as to the exact direction of fire.[627] He generally alleges that the Trial Chamber failed to make this determination beyond reasonable doubt.[628]

223. Milošević submits that in the absence of a determination of the indicia established in the *Galić* case,[629] the Trial Chamber in the instant case based its decision on witness W-12's testimony, whose credibility and reliability was at issue. Specifically, Milošević submits that witness W-12 was unreliable in identifying the date on which the shelling took place. In a statement taken one year after the incident, witness W-12 stated that the incident took place on 22 November 1994.[630] However, in a statement taken by the Prosecution on 20 April 2006, witness W-12 expressed uncertainty as to the date.[631] Confronted with the latter statement during cross-examination, witness W-12 initially stated that he was unsure about the date and later stated that he was 90 percent sure that the date was November 1994.[632] Milošević submits that in order to clarify the issue of the date of the incident that W-12 witnessed, the Prosecution tendered an official note compiled by the Bosnian police, which was only signed by the Bosnian policeman in charge of investigating the incident of 22 December 1994. The witness did not sign this document.[633] Milošević further submits that a reasonable Trial Chamber could not have found beyond reasonable doubt that witness W-12's testimony concerned the same incident as the testimony of the 13 eyewitnesses to the event who had been interrogated by the Bosnian police, and upon whose evidence the Trial Chamber, *inter alia*, relied in support of its finding.[634] In the written statement that is the closest in time to the incident, witness W-12 referred to a single shot and one explosion.[635] Milošević submits that 11 of the 13 eyewitnesses to the incident heard neither the shells being fired nor their flight. Furthermore, he contends that all 13 witnesses heard two explosions at the site of the incident and none of them heard the noise of a shot as witness W-12 did.[636] In addition, Milošević submits that the Bosnian police also determined two points of impact of the projectiles during the incident of 22 December 1994.[637]

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[627] Defence Appeal Brief, para. 247.
[628] Defence Appeal Brief, para. 251.
[629] Defence Appeal Brief, para. 250.
[630] Defence Appeal Brief, para. 253.
[631] Defence Appeal Brief, para. 254.
[632] Defence Appeal Brief, paras 254-255.
[633] Defence Appeal Brief, para. 256.
[634] Defence Appeal Brief, paras 258-259, referring to Exhibits D124, pp. 16-29; P318.
[635] Defence Appeal Brief, para. 257.
[636] Defence Appeal Brief, para. 258.
[637] Defence Appeal Brief, para. 258. See also Defence Appeal Brief, para. 259, on other alleged inconsistencies.

224. Milošević concludes that the Trial Chamber erred in finding that the shells that exploded at the Baščaršija flea market were fired from the SRK-held territory. He argues that other conclusions could have been reasonably drawn, namely that the shells were fired from ABiH-held territory and/or that the explosive devices were set off in static conditions.[638]

225. The Prosecution responds that the Trial Chamber reasonably found that the shell that hit the Baščaršija flea market on 22 December 1994 was fired by members of the SRK.[639] In the Prosecution's view, Milošević has not demonstrated any error on the part of the Trial Chamber, and instead suggests a different reading of the evidence to conclude either that the shells were fired from ABiH-held territory or that they were static bombs.[640] The Prosecution submits that neither of these conclusions is reasonable on the totality of the evidence.[641]

226. The Prosecution further submits that Milošević has not shown how the Trial Chamber's failure to enter an ultimate finding on the calibre of the shells would have affected its determination of the origin of the fire.[642] Moreover, it argues that the Trial Chamber was not obliged to make specific findings on the exact direction and exact angle of descent.[643] In its view, the Trial Chamber was entitled to rely on the totality of the evidence to establish that the direction of the fire was south-east and that the shells were fired from SRK-held territory.[644] The Prosecution emphasizes that, despite the fact that the source of fire in the SRK-held territory was in the same line with the ABiH-held positions, it was reasonable for the Trial Chamber to conclude that the shells were fired from Vidikovac. The Prosecution finds support for this conclusion in the fact that the highest ABiH-held positions, such as Čolina Kapa, were much lower than the source of the shell heard by witness W-12 and other witnesses interviewed by the KDZ.[645]

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[638] Defence Appeal Brief, paras 260-261. Milošević also submits that the incident took place in the zone of responsibility of the ABiH 115th Brigade, of which witness W-12 was a member (Defence Appeal Brief, para. 242. See also, AT. 125).
[639] Prosecution Response Brief, para. 131.
[640] Prosecution Response Brief, para. 131. See also, AT. 115-116.
[641] Prosecution Response Brief, para. 131. By reference to para. 472 of the Trial Judgement, the Prosecution submits that the static theory had already been raised and addressed at trial.
[642] Prosecution Response Brief, para. 132.
[643] Prosecution Response Brief, para. 133.
[644] Prosecution Response Brief, para. 133. See also AT. 118-119.
[645] AT. 113-114, 118. The Prosecution further points out that the Trial Chamber had also had the opportunity to observe the locations of Baščaršija flea market, Mount Trebević and Vidikovac during the site visit (AT. 115).

227. Furthermore, the Prosecution submits that the Trial Chamber did not rely exclusively on witness W-12's testimony to determine the origin of the fire.[646] It acknowledges that in court witness W-12 had difficulties recalling whether the incident had taken place on 22 November 1994 or 22 December 1994.[647] However, it notes that in the statement given by witness W-12 two days after the incident, he testified to the 22 December 1994 shelling.[648] It finally submits that witness W-12 had "no clear recollection" of a second round being fired, yet testified that he had been informed thereof through the radio and by his neighbours later that day.[649] The Prosecution submits that Milošević has failed to establish that no reasonable Trial Chamber could have accepted the evidence of witness W-12.[650]

2. Analysis

228. The Trial Chamber noted that investigations into this incident were carried out by the KDZ, the UNPROFOR French Battalion, and two UNMOs, Major Hanga Tsori Hammerton and Major Ilonyosi.[651] The Trial Chamber recognized that the UNMO and KDZ investigation reports differed with respect to the calibre of the shells that exploded at the flea market.[652] However, it was satisfied on the basis of both investigations that the direction of the fire was south-east from Mount Trebević.[653] Based on the fact that the BiH police identified "the enemy positions" as the origin of the fire and considering witness W-12's testimony about hearing a shell being fired from Vidikovac, a part of Mount Trebević, the Trial Chamber determined that the shells were fired from the SRK-held territory by members of the SRK.[654]

229. The Appeals Chamber notes that regarding the direction of the fire, the evidence clearly shows that both shells that exploded on 22 December 1994 at the Baščaršija flea market were fired from the south-east.[655] Concerning the origin of the fire, witness W-12 determined from the sound of one of the shells that it came from Vidikovac, an SRK-held territory. He saw neither the shell

[646] Prosecution Response Brief, para. 133. See also AT. 113-115, referring to Exhibits D101, p. 2; D124, pp. 1, 3, 6-7, 22, 25; P833, p. 6.
[647] Prosecution Response Brief, para. 134.
[648] Prosecution Response Brief, para. 134, referring to Exhibit P309 (confidential).
[649] Prosecution Response Brief, para. 134.
[650] Prosecution Response Brief, para. 134.
[651] Trial Judgement, para. 469.
[652] Trial Judgement, para. 473.
[653] Trial Judgement, paras 470, 473.
[654] Trial Judgement, para. 473.

being fired nor its flight.[656] The KDZ report of the incident identified the direction from where the two projectiles were fired as "the direction of Trebević (azimuth angle: 159 degrees) where the enemy positions are located."[657] The Appeals Chamber notes Exhibit D102, which is a map marked by witness Suljević who investigated the incident.[658] The said exhibit shows that both Čolina Kapa, an ABiH-held territory, and Vidikovac, an SRK-held territory, are located at Trebević at a close proximity to the line of fire identified by the witness.[659]

230. The record indicates that the testimony of witness W-12 was the only evidence identifying with precision Vidikovac as the origin of the fire.[660] Witness W-12 based his conclusion solely on the sound of one shell being fired. The Appeals Chamber recalls that the determination of where a shell comes from is a difficult process that may require, depending on the circumstances, consideration of factors such as the bearing, the angle of descent, and the charge of the shell.[661] Because of the location of the ABiH and SRK positions, both in the direction from which the shell was fired, the testimony of witness W-12 was insufficient, in the given circumstances, to establish beyond reasonable doubt that the first shell was fired from the Vidikovac area. Accordingly, the Trial Chamber was required to consider other relevant factors such as the charge of the shell. As explained in *Galić,* the charge determines the speed, and thus, the distance travelled by the shell. The best evidence for that comes from the depth of the crater and the composition of the ground.[662] Accordingly, given the presence of both ABiH and SRK positions in the same direction, but located at different distance from the Baščaršija flea market, an analysis of the charge could have

[655] Trial Judgement, para. 470, referring to Ekrem Suljević, 2 Mar 2007, T. 3114 and 5 Mar 2007, T. 3128–3129; Exhibits Ekrem Suljević, P310, p. 3; P315, p. 1; D102; W-28, P275 (under seal), p. 2; D101, p. 2.
[656] Trial Judgement, para. 467, referring to W-12, 1 Mar 2007, T. 3039-3041 and 2 Mar 2007, T. 3062; Exhibits P306 (under seal), p. 2; P308; W-28, P275 (under seal), p. 2.
[657] Exhibit P315. See also, Ekrem Suljević, P310, p. 3: "In this particular case because there were no buildings directly in front of the place where the shell hit, it was not possible to determine where on Trebevic [*sic*] the shell originated. We could have determined the origin of fire if we had satelite [*sic*] or radar equipment which we do not have".
[658] Exhibit D102.
[659] See also, Huso Palo, 5 Feb 2007, T. 1546; Thomas Knustad, 13 Feb 2007, T. 2025-2026; Zoran Trapara, 26 Jun 2007, T. 7301; Predrag Trapara, 27 Jun 2007, T. 7373.
[660] The Appeals Chamber also notes that one of the eye-witnesses interviewed by the KDZ for the purposes of their official report "pointed toward the plateau on Vidikovac about 500 metres away from his house as the crow flies" (Exhibit D124, p. 6). However, this person also only heard the sound of the shells being fired and did not see where they were from precisely. Two other persons interviewed by the KDZ identified the sound of the fire as coming from Trebević without specifying a more precise location (Exhibit D124, pp. 22, 25). None of these persons provided statements to or testified before the Trial Chamber.
[661] *Galić* Appeal Judgement, paras 318, 330.

determined with greater precision the position where the shell was fired from. Witness Suljević testified, however, that the investigative team calculated neither the distance from which the shell was fired nor the angle of descent.[663] Consequently, the KDZ investigation report concerning this incident established the direction but not the precise origin of fire.[664] Similarly, the UNMO who investigated the incident conducted a crater analysis in order to determine the calibre of the shell but he could not determine the range of the projectile.[665] The Trial Chamber failed to address these deficiencies and to articulate its reasons for dismissing other possible conclusions with respect to the origin of fire. The Appeals Chamber therefore notes that whereas the evidence presented was sufficient to establish the *direction* of the fire, it was insufficient to establish beyond reasonable doubt its *origin*, taking into account the positions of the warring parties at the time of the incident.

231. The Appeals Chamber further rejects the Prosecution's argument that the Trial Chamber's conclusion should be maintained given that there is no evidence that the shells may have originated from the ABiH.[666] It recalls that the Prosecution bears the burden of establishing beyond reasonable doubt facts material to the guilt of an accused and suggesting that the Defence should present evidence proving the contrary would be an impermissible shift of such burden.[667] In this case, the Prosecution has not shown that the evidence adduced at trial was sufficient to ascertain beyond reasonable doubt that the shells were fired by the SRK.

3. Conclusion

232. In light of the above, the Appeals Chamber finds that the evidence on the record could lead a reasonable Trial Chamber to conclude that it was *most likely* that the shells that hit the Baščaršija flea market on 22 December 1994 were fired from SRK-held territory, but not to establish this beyond reasonable doubt.

C. Incident of 28 August 1995

233. Under his third sub-ground of appeal, Milošević submits that the Trial Chamber could not have found beyond reasonable doubt that the SRK fired the mortar shell that exploded on 28 August

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[662] *Galić* Appeal Judgement, para. 330.
[663] Trial Judgement, para. 470.
[664] Trial Judgement, para. 470, referring to Exhibit P315.
[665] Exhibit D101, p. 2. See also P833, p. 6 only referring to the direction of fire as being South-East and suggesting that it was an 82 mm mortar shell.
[666] AT. 112, 116.
[667] See *supra*, Section III.A.1.

1995 on Mula Mustafe Bašeskije Street situated just outside the Markale Market.[668] In light of its findings under Section XI.B.2 below, the Appeals Chamber considers that the arguments of the parties regarding the provenance of this shelling incident are moot for the purposes of the present Judgement.

D. Conclusion

234. In light of the above, the Appeals Chamber grants Milošević's eighth ground of appeal in part and overturns his conviction for the shelling incident of 22 December 1994. The remainder of this ground of appeal is dismissed.

[668] Defence Appeal Brief, para. 263.

X. ALLEGED ERRORS RELATED TO THE FINDINGS ON AERIAL BOMBS (MILOŠEVIĆ'S NINTH, TENTH AND ELEVENTH GROUNDS OF APPEAL)

235. Under these three grounds of appeal, Milošević challenges various findings made by the Trial Chamber in relation to the possession and use of so-called "modified air bombs" or "aerial bombs". Given that the relevant findings of the Trial Chamber are closely related and the arguments of the parties under these grounds are largely repetitive, the Appeals Chamber will address them in one section subdivided by subject-matter.

A. Arguments of the parties

236. Milošević first claims that the Trial Chamber erred in concluding that the ABiH did not have aerial bombs.[669] He argues that the evidence on the record shows that the ABiH obtained control of the Pretis factory, which manufactured aerial bombs.[670] In addition, Milošević points out that apart from the ABiH, NATO also launched aerial bombs on the territory of Sarajevo.[671] He also argues that the Trial Chamber's specific findings with respect to the air bombing incidents were premised on the incorrect assumption that only the SRK possessed air bombs, thus undermining the standard of proof beyond reasonable doubt required to establish the SRK's responsibility for each bombing.[672]

237. Milošević claims that the ABiH launched at least one aerial bomb that hit the RTV building on 28 June 1995.[673] He argues that the Trial Chamber misinterpreted the evidence in relation to this incident, described in paragraphs 580 through 623 of the Trial Judgement.[674] He submits that the Trial Chamber determined the origin of the aerial bomb by relying on the testimony of witness Brennskag and on an unsigned report attributed to Milošević himself dated 30 June 1995.[675]

[669] Defence Appeal Brief, p. 86.
[670] Defence Appeal Brief, para. 288, referring to Berko Zečević, 20 Apr 2007, T. 4817; Goran Kovačević, 13 Jun 2007, T. 6593; Exhibit D227.
[671] Defence Appeal Brief, para. 304, referring to P27, para. 49.
[672] *E.g.*, Defence Appeal Brief, paras 290 and 294, referring to Trial Judgement, para. 107; Defence Appeal Brief, para. 311. See also Defence Appeal Brief, para. 312, referring to Trial Judgement para. 107 and to Defence Appeal Brief paras 288-306.
[673] Defence Appeal Brief, paras 289-290.
[674] Defence Appeal Brief, paras 290-291.
[675] Defence Appeal Brief, para. 293. That report states, *inter alia*: "[o]ur artillery forces are responding with precision to the Muslim artillery attacks. In one such response on 28 June they hit

However, Milošević contends that the Trial Chamber disregarded a different version of events provided by the Trial Chamber's witness Knowles and a report written by his superior, witness Hansen,[676] according to which the air bomb came from the north-west, which was the territory held by the ABiH.[677] In Milošević's view, the Trial Chamber provided insufficient reason for preferring the evidence of witness Brennskag to that of witnesses Knowles or Hansen.[678] In this regard, Milošević contends that witness Brennskag did not report the flight and explosion of an aerial bomb to the UNMO headquarters on 28 June 1995 and alleges that his testimony was evasive and vague in cross-examination.[679] Further, he states that the report later admitted as Exhibit D103, despite being favourable to Milošević, had not been disclosed to him pursuant to Rule 68 of the Rules and that the Prosecution even removed witness Hansen from its Rule 65 *ter* list.[680] With regard to Exhibit P42, Milošević asserts that this document does not mention aerial bombs and is not signed, thus casting doubts on its authenticity.[681] He further notes that according to some evidence, aerial bombs in possession of the SRK had only a 100-metre range, which is incompatible with the type of weapon used in the attack against the TV building.[682]

238. Milošević's second contention is that no reasonable Trial Chamber would have found that the explosions referred to in paragraphs 443, 492, 507, 519, 531, 538, 551, 560, 639, 650, and 668 of the Trial Judgement were caused by aerial bombs. In this regard, Milošević relies on the expert report of witness Garović (whom he identifies as "T18") and on witness Žečević's evidence (referred to as "W15"), "an expert on aerial bombs" who provided the technical characteristics of aerial bomb type "FAB 250".[683] According to Milošević, this evidence shows that the features of this type of weapon, which contains 90 kilograms of TNT, raise doubt as to the use of aerial bombs in the relevant incidents.[684] He points to the fact that this type of aerial bomb generally disperses between 7,000 and 20,000 fragments. Concerning FAB-250 aerial bombs charged with aerosol

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the BH RTC /BH ?Radio and Television Centre/, the centre of media lies against the just struggle of the Serbian people." (Exhibit P42, p. 1).

[676] Throughout the Trial Judgement, the Trial Chamber referred to Capt. Hansen's report as Exhibit P894. This report was also marked for identification under number D31 and was classified as confidential. The Appeals Chamber notes that Exhibit D103 referred to by Milošević is identical to Exhibit D31, save for the sketch attached to Exhibit D103.

[677] Defence Appeal Brief, paras 293-294.

[678] Defence Appeal Brief, paras 294 and 302.

[679] Defence Appeal Brief, para. 296.

[680] Defence Appeal Brief, paras 297-298.

[681] Defence Appeal Brief, para. 303.

[682] Defence Appeal Brief, para. 306.

[683] Defence Appeal Brief, para. 307.

[684] Defence Appeal Brief, para. 307.

explosives, Milošević argues that the little-to-no shrapnel found at the sites of the incidents, as well as the number of the victims and their injuries are not typical of the blast effects of fragmentation bombs. Milošević further raises particular challenges with regard to the shelling of Majdanska Street on 24 May 1995 and of the BITAS building on 22 August 1995. He argues that the Trial Chamber should have required corroboration of the Bosnian police report according to which an aerial bomb explosion was possible.[685] Finally, with regard to the shelling of Bjelašnička Street on 23 July 1995, Milošević emphasizes the importance of the fact that no shrapnel was found on the site by the Bosnian police.[686] Thus, Milošević contends that the evidence reasonably suggests that those explosions were caused by an explosive device other than FAB aerial bombs or aerosol bombs.[687]

239. Milošević further contests the expert evidence as to the length of aerial bomb trajectories[688] and asserts that the Trial Chamber committed an error of law by relying thereupon.[689] Moreover, he argues that the Trial Chamber omitted "other indicia" and disregarded the "ambiguities concerning the direction of fire".[690] In this regard, Milošević notes that the ABiH troops were positioned at "all distances" from the explosion sites.[691]

240. In sum, Milošević acknowledges that the SRK under his command had and used aerial bombs. However, he contends that these bombs were never launched against the civilian population.[692] At the same time, he also appears to suggest that had it been proved that the bomb that struck the RTV building came from the SRK, it would have been "a legal response to ABiH attacks".[693]

241. Regarding Milošević's general arguments, the Prosecution responds that Milošević failed to show how the finding of the Trial Chamber that only the SRK possessed and used modified air

[685] Defence Appeal Brief, paras 315 and 316 referring to Trial Judgement paras 519 and 661.
[686] Defence Appeal Brief, para. 317, referring to Trial Judgement para. 652; Berko Zečević, 23 Apr 2007, T. 4946-4947; Vekaz Turković 26 Apr 2007, T. 5234.
[687] Defence Appeal Brief, paras 307-309.
[688] Defence Appeal Brief, para. 312, referring to Berko Zečević.
[689] Defence Appeal Brief, para. 313, referring to Trial Judgement paras 443, 508, 521, 533, 539, 552, 561, 640, 652 and 669 (Trial Chamber findings in respect of each aerial bombing incident except for the shelling in Hrasnica on 7 April 1995).
[690] Defence Appeal Brief, para. 314.
[691] Defence Appeal Brief, para. 314.
[692] Defence Appeal Brief, para. 305.
[693] Defence Appeal Brief, para. 303.

bombs was unreasonable.[694] It points out that during the Indictment period, the Pretis factory was under SRK control and continued to produce air bombs.[695] It further argues that the fact that the ABiH may have obtained ammunitions from that factory prior to 1992 does not contradict the Trial Chamber's finding that the ABiH did not possess modified air bombs in 1994 and 1995.[696] The Prosecution suggests that the Trial Chamber carefully assessed the evidence to determine the origin of each of the modified air bombs.[697] It submits that Milošević fails to substantiate his assertion that the Trial Chamber misapplied the standard of proof beyond reasonable doubt or opted for the interpretation of the evidence with prejudice to him.[698] The Prosecution stresses that the Trial Chamber based its findings on "the totality of the evidence presented".[699]

242. With respect to the specific challenges, the Prosecution first submits that the Trial Chamber correctly concluded that the RTV building was shelled by an SRK modified air bomb on 28 June 1995.[700] The Prosecution suggests that Milošević's interpretation of the evidence, based on only two sources, fails to show how the Trial Chamber erred in its assessment of the totality of the trial record on this issue.[701] Specifically, the Prosecution argues that the Trial Chamber carefully considered witness Knowles's evidence and found it to be "vague and full of caveats".[702] With regard to witness Hansen's report, the Trial Chamber considered it to be hearsay and, unlike other UNMO reports on the record, unreliable because it was the only piece of evidence identifying ABiH territory as the origin of fire.[703] Moreover, the Prosecution notes that, contrary to Milošević's allegation, the said report was actually disclosed to Milošević on 31 January 2006, almost one year

[694] Prosecution Response Brief, paras 140, 156, referring to Trial Judgement, paras 107-108.
[695] Prosecution Response Brief, para. 142, referring to Trial Judgement, paras 87, 93, 102, 128, 537, 559.
[696] Prosecution Response Brief, para. 142, referring to Trial Judgement, para. 107.
[697] Prosecution Response Brief, para. 168.
[698] Prosecution Response Brief, para. 169.
[699] Prosecution Response Brief, para. 170.
[700] Prosecution Response Brief, paras 143-145. It lists the evidence supporting this conclusion as: eyewitness Brennskag's testimony, the testimonies of an expert witness on this type of weapons and an on-site ballistic expert, the testimony of a KDZ member, and a civilian who was present during the attack inside the building. These testimonies are corroborated, in the Prosecution's view, by Exhibits P42, P134, P135 and P633 (under seal).
[701] Prosecution Response Brief, paras 146-147 and 153. In reply, Milošević mentions that "the Prosecution attempted to mislead Witness Knowles and already explained itself on this matter during the trial" but that, despite this, witness Knowles confirmed his testimony. (Defence Reply Brief, para. 13, referring to Andrew Knowles, 25 Sep 2007, T. 9363-9364 and T. 9349, respectively).
[702] Prosecution Response Brief, para. 150, referring to Trial Judgement, para. 621.
[703] Prosecution Response Brief, para. 151.

before the beginning of the trial.[704] In relation to Exhibit P42, the Prosecution responds that Milošević accepted its authenticity at trial and is therefore precluded from challenging it now.[705]

243. Second, the Prosecution responds that the absence of fragments does not exclude the use of modified air bombs filled with fuel-air mixture rather than TNT. It claims that the evidence on the record in fact shows that the effect of that type of air bomb is to cause a lethal wave of overpressure with a damage pattern different from TNT projectiles.[706] The Trial Chamber, in the Prosecution's view, came to the correct conclusion in establishing that fuel-air mixture air bombs were used during the war[707] and in accepting that BiH investigation teams had decided not to collect fragments for determining the nature of weapons in those circumstances.[708] The Prosecution also disputes the use of the evidence cited by Milošević to prove that damages and injuries from the shelling incidents are not typical of air bombs, because in its view, the experts cited testified about the optimal effect of air bombs when dropped from aircrafts, not when used as modified air bombs launched from the ground.[709] In this regard, the Prosecution relies on the evidence of witness Zečević, which was accepted as reliable by the Trial Chamber.[710] The Prosecution further refers to other factors considered by the Trial Chamber in reaching its findings on modified air bombs, such as: (i) the visual and sound characteristics of this type of weapons when fired, (ii) their way of launching and flying, (iii) the remnants they leave; and (iv) other contemporaneous documents and testimonies showing that this type of weapon was indeed used.[711]

244. Third, the Prosecution refers to the evidence relied upon by the Trial Chamber in determining that the projectile which struck Majdanska Street on 24 May 1995[712] was a modified air bomb.[713] It argues that Milošević has not demonstrated an error of fact in relation to the

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[704] Prosecution Response Brief, para. 152 (mentioning that the B/C/S translation was disclosed to Milošević on 20 October 2006).
[705] Prosecution Response Brief, para. 154.
[706] Prosecution Response Brief, paras 157-158.
[707] Prosecution Response Brief, para. 159.
[708] Prosecution Response Brief, para. 160.
[709] Prosecution Response Brief, para. 161.
[710] Prosecution Response Brief, paras 162-164, referring to Trial Judgement, paras 92, 94-95, 107 and the evidence referred to therein (as well as paras 440, 476, 478, 483, 494, 498, 500, 502, 516, 524, 526, 528, 531, 535, 538, 545, 547, 549, 551, 585-586, 588, 595, 600, 627, 631, 645, 659-660 on the single incidents).
[711] Prosecution Response Brief, paras 165-166.
[712] Trial Judgement, para. 519.
[713] Prosecution Response Brief, para. 173, referring to the KDZ investigation, witness Jašarević's testimony and the BiH investigation file records.

projectile that struck the BITAS building on 22 August 1995 either.[714] The Prosecution further submits that the Trial Chamber reasonably concluded that the projectile that hit Bjelašnička Street on 23 July 1995 was a modified air bomb.[715] It notes that the Trial Chamber was aware that the BiH police report did not mention shrapnel, but emphasizes the testimony of witness Turković, who reported that parts of rocket motors had been collected to establish the type of weapon.[716] The Prosecution further contends that Milošević has not addressed witness Kršo's testimony.[717] Finally, it notes eyewitness evidence suggesting that the aerial bombs could be fired from longer distances than indicated in witness Zečević's testimony.[718] The Prosecution does not contest the assertion that there were ABiH positions at similar directions and ranges to those indicated by witness Zečević. Rather, it argues that Milošević has not demonstrated that the Trial Chamber's findings were unreasonable.[719]

B. Analysis

1. ABiH alleged possession of air bombs

245. When discussing the weaponry available to the parties to the conflict in and around Sarajevo, the Trial Chamber analysed the evidence related to "modified air bombs", defined as air bombs with rockets attached that are fired from launch pads on the ground rather than from airplanes.[720] In response to Milošević's arguments at trial, it further examined the question whether only the VRS had access to and used such modified air bombs and concluded that the ABiH did not possess such bombs.[721] It noted, *inter alia*, that Milošević's suggestion that ABiH possessed modified air bombs during the Indictment period "was consistently rejected by all Prosecution witnesses who were asked about it", as they testified that "the ABiH could neither produce air bombs, nor transport them through the tunnel and did not possess any rockets to attach them to air bombs".[722] Milošević does not challenge this or any other evidence referred to in paragraphs 107 and 108 of the Trial Judgement. He simply reiterates his arguments presented at trial and his

[714] Prosecution Response Brief, para. 174, referring to Trial Judgement, paras 661,668.
[715] Prosecution Response Brief, para. 175.
[716] Prosecution Response Brief, para. 175.
[717] Prosecution Response Brief, para. 175.
[718] Prosecution Response Brief, para. 170.
[719] Prosecution Response Brief, para. 171.
[720] Trial Judgement, paras 92-101.
[721] Trial Judgement, paras 102-108.
[722] Trial Judgement, para. 107.

interpretation of certain evidence without showing any specific error in the Trial Chamber's conclusions.

246. In addition to drawing a general conclusion on this subject, the Trial Chamber considered the allegation that the ABiH used this type of weapon during the conflict in examining each of the individual incidents.[723] Consequently, even if Milošević's general allegation regarding the ABiH possession of the air bombs during the Indictment period were shown to be true, it would have been without bearing on the conclusions with respect to the specific incidents for which he was convicted.

2. Incident of 28 June 1995 (shelling of the TV Building)

247. The Trial Chamber explicitly considered and rejected Milošević's submission that the bomb that struck the TV building on 28 June 1995 was launched from ABiH-held territory.[724] Contrary to his assertion on appeal that the Trial Chamber based its finding on the assumption that the ABiH did not possess aerial bombs, the Trial Chamber analysed extensive evidence on the direction of fire of the shelling in this specific incident.[725] The Trial Chamber carefully assessed this evidence, starting from the reports on the explosion site and the ballistic reports.[726] It then considered testimonial evidence from expert witnesses, Bosnian officials, and at least one eyewitness, namely witness Brennskag.[727] In reaction to Milošević's submissions, the Trial Chamber examined witness Hansen's evidence noting, in particular, that (i) he had not seen the incident himself; (ii) according to witness Brennskag's testimony, if the bomb originated as suggested by witness Hansen it would have been launched almost horizontally; and (iii) his testimony was contradicted by other evidence on the record.[728] Furthermore, having decided to call witness Knowles under Rule 98 of the Rules, the Trial Chamber thoroughly discussed his evidence, including his comments on the above-mentioned testimonies and reports.[729] Finally, the Trial Chamber also discussed the

[723] Trial Judgement, para. 108.
[724] Trial Judgement, paras 607-609, 620-623.
[725] Trial Judgement, paras 601-617.
[726] Trial Judgement, para. 601.
[727] Trial Judgement, paras 602-606.
[728] Trial Judgement, paras 607-609.
[729] Trial Judgement, paras 610-614. The Trial Chamber notably considered that witness Knowles accepted that the projectile could have come from further away that he though it had (*id.*, para. 611, referring to Andrew Knowles, 25 Sep 2007, T. 9389-9390) and that it was possible that "what he had witnessed was a 'secondary event', a coincidental and simultaneous round coming from a different direction that may not have been the one which struck the TV Building" (*id.*, para. 614, referring to Andrew Knowles, 25 Sep 2007, T. 9363, 9397).

contemporaneous documents related to the incident, such as an SRK report dated 30 June 1995 and minutes of a meeting between UNPROFOR officials and SRK officers.[730]

248. Reiterating his arguments presented at trial, Milošević does not demonstrate why the manner in which the Trial Chamber relied on the evidence was incorrect. In this regard and with respect to witnesses Knowles and Hansen, the Trial Chamber gave specific reasons for rejecting their evidence, noting particularly that the former was "vague and full of caveats", and that the latter was hearsay and singularly contrary to evidence coming from other first-hand witnesses.[731] The Appeals Chamber recalls that "corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies" and that it is "neither a condition nor a guarantee of reliability of a single piece of evidence".[732] However, given that the assessment of evidence, including corroboration, is a matter of the Trial Chamber's discretion, the Appeals Chamber is not satisfied that Milošević has shown that in the circumstances of the case, the Trial Chamber abused its discretion in rejecting witnesses Knowles and Hansen's evidence while relying on the evidence supporting the Prosecution's case. Given the reasoning provided by the Trial Chamber in its assessment of the evidence, the Appeals Chamber also rejects Milošević's argument that either of these witnesses was misled by the Prosecution.

249. Regarding Milošević's challenges to the authenticity of Exhibit P42, the Appeals Chamber notes that, other than mentioning that the document was unsigned, he fails to specify his claims. The Appeals Chamber further notes that Milošević did not formulate any challenge to the admission of this exhibit at trial.[733] While pointing out that the document was unsigned, Milošević did not explicitly contest the fact that the document originated from him.[734] Regarding the disclosure of Exhibit D103, the Appeals Chamber accepts that the Prosecution disclosed it to Milošević without

[730] Trial Judgement, paras 615-617.
[731] Trial Judgement, para. 621. The Appeals Chamber recalls that the fact that certain evidence is hearsay does not in itself suffice to render it not credible or unreliable but Trial Chambers have wide discretion as to the assessment of the weight and probative value of the hearsay evidence alongside with other factors relevant to the evaluation of the totality of the evidence (see *Karera* Appeal Judgement, para. 39).
[732] *Limaj et al.* Appeal Judgement, para. 203, referring, *inter alia*, to *Aleksovski* Appeal Judgement, paras 62-63; *Čelebići* Appeal Judgement, paras 492, 506; *Gacumbitsi* Appeal Judgement, para. 72; *Musema* Appeal Judgement, paras 37-38; See also *Karera* Appeal Judgement, para. 45.
[733] Louis Fortin, 17 Jan 2007, T. 504-505, 555. The Appeals Chamber notes that this document was again admitted in evidence on 1 February 2007 as P152 (T. 1440).
[734] Barry Hogan, 2 May 2007, T. 5565; Andrew Knowles, 25 Sep 2007, T. 9361.

prejudice to the conduct of his Defence.[735] In any case, in light of the analysis above, neither of these exhibits was determinative of the Trial Chamber's conclusions.

250. Finally, the Appeals Chamber cannot accept Milošević's argument that the shelling incident could have been a legitimate military action since the TV Building was clearly a civilian object. Witnesses testified at trial that there were neither any military targets or activity, nor any ABiH military equipment inside or around the TV Building.[736] Moreover, with respect to Milošević's allegation that the bombing was "a legal response to ABiH attacks", the Appeals Chamber re-emphasizes that reciprocity or *tu quoque* defence may not be used to justify a serious violation of international humanitarian law.[737]

251. In light of the foregoing, the Appeals Chamber finds that Milošević failed to show that no reasonable trier of fact could have found on the basis of the evidence presented before the Trial Chamber that the TV building was hit by a modified air bomb launched from the SRK-held territory.

3. Use of aerial bombs in explosions between 7 April and 23 August 1995

252. The Trial Chamber found that modified air bombs were used by the SRK in several incidents during which unlawfully targeted civilians were hit. These incidents are: the shelling of 5 Geteova Street on 28 June 1995;[738] the shelling in Hrasnica on 7 April 1995;[739] the shelling incidents of Safeta Zajke Street[740] and of Majdanska Street[741] on 24 May 1995; the shelling of Safeta Hadžića Street on 26 May 1995;[742] the shelling of the University Medical Centre,[743] of 10 Trg Međunarodnog Prijateljstva,[744] and of Čobanija Street on 16 June 1995;[745] the shelling of the

[735] Prosecution Response Brief, para. 152. The Appeals Chamber notes that Milošević did not reply on this point.
[736] Trial Judgement, para. 582, referring to W-138, 31 Jan 2007, T. 1282; Rialda Musaefendić, 28 Feb 2007, T. 2911; W-28, P275 (under seal), p. 2; John Jordan, P267, p. 8; W-156, 27 Apr 2007, T. 5376-5377 (closed session).
[737] *Martić* Appeal Judgement, para. 111; *Kupreškić et al.* Appeal Judgement, para. 25.
[738] Trial Judgement, para. 443.
[739] Trial Judgement, para. 492.
[740] Trial Judgement, para. 507.
[741] Trial Judgement, para. 519.
[742] Trial Judgement, para. 531.
[743] Trial Judgement, para. 538.
[744] Trial Judgement, para. 551.
[745] Trial Judgement, para. 560.

TV building on 28 June 1995;[746] the shelling of Alekse Šantića Street and of Bunički Potok Street on 1 July 1995;[747] the shelling of Bjelašnička Street on 23 July 1995;[748] and the shelling of the BITAS building on 22 August 1995.[749]

253. The Appeals Chamber notes that Milošević's arguments concerning these explosions were considered and rejected at trial.[750] Therefore, as consistently reiterated by the Appeals Chamber, Milošević cannot merely repeat them on appeal but rather bears the burden of showing that the Trial Chamber committed a specific error of law or fact that invalidated the decision or weighed relevant or irrelevant considerations in an unreasonable manner. Instead, he offers a different, allegedly reasonable, interpretation of the evidence[751] and fails to show that no reasonable trier of fact could have reached the same conclusions beyond reasonable doubt as the Trial Chamber. The Appeals Chamber reiterates that the standard of appellate review permits a conclusion to be upheld on appeal even where other inferences sustaining guilt could reasonably have been drawn at trial.[752]

254. The Appeals Chamber notes that the Trial Chamber considered evidence showing that two types of air bombs were used in Sarajevo: the FAB-100 and the FAB-250.[753] The first type normally contains TNT as its explosive charge, while the second type of bomb uses a fuel-air mixture.[754] This second type of explosive mixture, with an estimated effective range of 5.820 to 7.680 metres, leaves few to no fragments and produces a blast wave resulting in injuries and damage very different from that of TNT.[755] Milošević does not appear to challenge these conclusions *per se*.

255. With regard to the specific incidents identified by Milošević, the Trial Chamber almost invariably referred to evidence indicating the use of a modified FAB-250 aircraft bomb.[756] Considering the arguments of the parties above, the Appeals Chamber finds that Milošević has failed to show in relation to the number of fragments and the type of injuries or damages caused by

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[746] Trial Judgement, para. 618.
[747] Trial Judgement, para. 639.
[748] Trial Judgement, para. 650.
[749] Trial Judgement, para. 668. That said, the Appeals Chamber considers that in light of its findings under Section XI.B.2 *infra*, the argument regarding the type of the bombs used for the shelling of the BITAS building is moot.
[750] Trial Judgement, paras 99-101, 443, 492, 507, 519, 531, 538, 551, 560, 639, 650, 668.
[751] Defence Appeal Brief, para. 308.
[752] See *supra*, Section III, para. 20.
[753] Trial Judgement, para. 93.
[754] Trial Judgement, para. 94.
[755] Trial Judgement, paras 94-95.

these incidents of shelling that no reasonable Trial Chamber could reach the conclusion beyond reasonable doubt that FAB-250 fuel-air bombs were used in those incidents.

256. Exceptions to the previous findings are the shelling of Safeta Hadžića street on 26 May 1995,[757] the University Medical Centre on 16 June 1995,[758] and 10 Trg Međunarodnog Prijateljstva on 16 June 1995.[759] In these three instances, no explicit reference is made in the Trial Judgement to evidence suggesting that the modified air bombs in question were FAB-250 fuel-air charged. Nevertheless, the Appeals Chamber notes that in all three instances, the Trial Chamber had evidence at its disposal to assess the origin of fire and the type of damage and injuries caused,[760] and, contrary to Milošević's submission, did not base its findings on the assumption that only the SRK possessed aerial bombs. Accordingly, Milošević fails to demonstrate that the relevant findings of the Trial Chamber concerning the employment of modified air bombs were erroneous. Therefore, even if different types of modified air bombs were used in some of these instances, such a finding would be without impact on Milošević's convictions.

257. The Appeals Chamber further notes that concerning the shelling of Majdanska Street on 24 May 1995, the Trial Chamber established the type of the projectile on the basis of witness Jašarević's testimony, the conclusion of the KDZ investigation, and the presence of remnants of a rocket, shrapnel, and parts of an aerial bomb at the site of the incident.[761] As to the finding of the Trial Chamber that the projectile that struck Bjelašnička Street on 23 July 1995 was a modified air bomb, the Appeals Chamber notes that Milošević's argument concerning the lack of shrapnel was considered and rejected at trial.[762] In this regard, the Appeals Chamber recalls that in addition to the testimony of witnesses Turković and Kršo,[763] the Trial Chamber was presented with the evidence of witness Zečević that a bomb with a fuel-air explosive left little or no shrapnel around the point of

[756] Trial Judgement, paras 441, 491, 503, 519, 557, 632, 634, 648, 665.
[757] Trial Judgement, paras 529-533.
[758] Trial Judgement, paras 536-538.
[759] Trial Judgement, paras 544-551.
[760] See, in particular, Trial Judgement, paras 529-533 (in relation to the shelling of Safeta Hadžića Street on 26 May 1995); Exhibit P321, p. 1, referred to, *inter alia*, in Trial Judgement, para. 536 (in relation to the shelling of the University Medical Centre on 16 June 1995); Trial Judgement, paras 544-550 (in relation to the shelling of 10 Trg Međunarodnog Prijateljstva).
[761] Trial Judgement, para. 519.
[762] Trial Judgement, para. 650.
[763] Vekaz Turković, 26 April 2007, T. 5232; Edisa Kršo, P644, p. 5.

detonation.[764] Accordingly, Milošević fails to show that the Trial Chamber's findings as to the type of weapon employed in the relevant incidents were erroneous.

258. Finally, with respect to Milošević's general submission concerning the location of the ABiH positions, the Appeals Chamber notes that Milošević fails to develop his argument or to relate it to any of the specific incidents considered by the Trial Chamber. His allegation therefore remains vague and unclear, and as such, does not merit further consideration by the Appeals Chamber. The Appeals Chamber thus finds that Milošević has failed to demonstrate that no reasonable Trial Chamber could have found that the SRK was behind the aerial bombings.

259. In light of the analysis above, the Appeals Chamber is unable to discern any specific argument underlying Milošević's general assertion that the Trial Chamber failed to apply the rule of proof beyond reasonable doubt.[765]

C. Conclusion

260. For the reasons set out above, Milošević's ninth, tenth and eleventh grounds of appeal are dismissed in their entirety.

[764] Trial Judgement, para. 94.
[765] See *supra*, para. 236 and fn. 672, referring to Defence Appeal Brief, para. 311.

XI. ALLEGED ERRORS CONCERNING THE FINDINGS THAT MILOŠEVIĆ ORDERED THE SNIPING AND SHELLING OF CIVILIANS (MILOŠEVIĆ'S TWELFTH GROUND OF APPEAL)

A. Modes of liability

1. Arguments of the parties

261. Under his twelfth ground of appeal, Milošević challenges the Trial Chamber's finding that he ordered attacks against civilians in and around Sarajevo.[766] He argues that no reasonable Trial Chamber would have reached the findings contained in paragraphs 961-979 and 999-1001 of the Trial Judgement.[767] While recognizing that "an order does not necessarily have to be written and that it may be proved on the basis of indirect evidence", Milošević claims that the existence of any order was not established beyond reasonable doubt.[768] He argues that the Trial Chamber erred in relying on Exhibits P225 and P226 to conclude that he ordered an attack against the civilian population of Hrasnica. He claims the orders were to attack the "city centre" of Hrasnica which the ABiH had transformed into a military zone.[769] Milošević insists that he in fact ordered the troops under his control to respect international humanitarian law and the laws of war.[770]

262. The Prosecution responds that the Trial Chamber reasonably concluded, upon considering the totality of the evidence, that Milošević ordered the crimes.[771] It asserts that the Trial Chamber did not err in finding that Milošević planned and ordered the campaign of sniping and shelling on the basis of the tight command held by him over the SRK and the pattern of the attacks. Further, in its view the Trial Chamber correctly relied on planning and ordering specific incidents, such as the shelling of Hrasnica, as evidence of planning and ordering the campaign.[772] It argues that the Trial Chamber did not rely on Exhibits P225 and P226 to conclude that Milošević ordered the shelling of the residential area of Hrasnica, but instead relied on several other pieces of evidence including evidence considered elsewhere in the Trial Judgement.[773] Furthermore, the Prosecution notes that the Trial Chamber acknowledged that it was not presented with any written order by Milošević

[766] Defence Appeal Brief, para. 318.
[767] Defence Appeal Brief, para. 318.
[768] Defence Reply Brief, para. 14; see also Defence Appeal Brief, para. 318 and AT. 154.
[769] Defence Appeal Brief, para. 318.
[770] Defence Appeal Brief, para. 318.
[771] Prosecution Response Brief, paras 177-178. See also AT. 91, 93-95.
[772] AT. 94.
[773] Prosecution Response Brief, para. 180, referring to Trial Judgement, para. 964, fns 3174-3176.

ordering the sniping of civilians. Considering the evidence that he issued orders to train, equip, and deploy snipers, the Trial Chamber reasonably concluded that Milošević ordered the targeting of civilians.[774] Finally, the Prosecution notes that the Trial Chamber carefully considered the evidence that Milošević had issued orders to respect international humanitarian law. Despite the evidence supporting this contention, it nonetheless reached the conclusion that he had ordered attacks on the civilian population.[775]

2. Analysis

263. At the outset, the Appeals Chamber notes that paragraphs 999-1001 of the Trial Judgement do not concern the Trial Chamber's finding that Milošević ordered the shelling and sniping of civilians but relate to the aggravating factors considered in the determination of Milošević's sentence. Subject to the Appeals Chamber's findings under this ground of appeal as to whether he actually ordered the attacks, the Trial Chamber's findings in paragraphs 999-1001 are analysed in the section on sentencing below.[776]

264. With respect to Milošević's factual challenges, and in light of its previous findings under Milošević's first and sixth grounds of appeal,[777] the Appeals Chamber rejects as moot Milošević's argument regarding Hrasnica being a "military zone" and thus a legitimate target of a military attack. In any case, his argument that the attack against Hrasnica could be legitimate as it anticipated concrete and direct military advantage[778] must fail because, due to its disproportionate and indiscriminate nature, it was unlawfully directed against the civilian population in the area.[779] The Appeals Chamber will therefore limit its analysis as to whether a reasonable trier of fact could,

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[774] Prosecution Response Brief, para. 181. See also AT. 94, where the Prosecution argues that the fact that "sniping occurred over an extended period of time in different areas of Sarajevo under the control of different SRK brigades" shows that the snipers' activity was coordinated, planned and ordered by Milošević.

[775] Prosecution Response Brief, para. 182.

[776] See *infra*, Section XII.B.2, paras 300 *et seq*.

[777] See *supra*, Section III.C.1.(b)(ii), paras 54 *et seq.*; Section VII.B, paras 139 *et seq.*

[778] *Strugar* Appeal Judgement, para. 179, referring to Additional Protocol I, Articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b); *Galić* Trial Judgement, para. 58 (and sources cited therein); *Galić* Appeal Judgement, paras 191-192.

[779] See *supra*, Section VII.B, para. 142. As consistently held by the Appeals Chamber, "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant […]. The issue at hand is whether the way the military action was carried out was criminal or not." (*Martić* Appeal Judgement, para. 268, quoting *Kordić and Čerkez* Appeal Judgement, para. 812). See also *supra*, para. 250.

on the basis of the case record, establish beyond reasonable doubt that Milošević ordered sniping and shelling of the civilian population in Sarajevo during the Indictment period.

(a) Ordering and planning the campaign

265. The Trial Chamber has adopted a very general approach in that it did not analyse whether Milošević ordered every sniping or shelling incident, but rather concluded that those incidents could only take place if ordered by him in the framework of the campaign directed against the civilian population of Sarajevo. In principle, this approach is not erroneous as such, given that both the *actus reus* and the *mens rea* of ordering can be established through inferences from circumstantial evidence, provided that those inferences are the only reasonable ones. The Appeals Chamber underlines, however, that when applying such an approach to the facts of the case, great caution is required.

266. First, the Appeals Chamber emphasizes that, as the Trial Chamber correctly held in its discussion of the widespread or systematic attack, "[a] campaign is a military strategy; it is not an ingredient of any of the charges in the Indictment, be that terror, murder or inhumane acts".[780] The Appeals Chamber notes, however, that in other parts of the Trial Judgement, the Trial Chamber appears to hold Milošević responsible for planning and ordering a campaign of crimes.[781] The Appeals Chamber understands these references as illustrating that the crimes at stake formed a pattern comprised by the SRK military campaign in Sarajevo. Therefore, the "campaign" in the present Appeal Judgement shall be understood as a descriptive term illustrating that the attacks against the civilian population in Sarajevo, in the form of sniping and shelling, were carried out as a pattern forming part of the military strategy in place.

267. Second, the Appeals Chamber notes that the Trial Chamber did not rely on any evidence that would identify a specific order issued by Milošević with respect to the campaign of shelling and sniping in Sarajevo as such. Rather, it relied on the nature of the campaign carried out in the context of a tight command to conclude that it could only "have been carried out on [Milošević's] instructions and orders".[782] The Appeals Chamber recalls that the *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of "instructing", pivotal to the understanding of the question of "ordering", requires "a positive action by the person in a

[780] Trial Judgement, para. 927.
[781] Trial Judgement, paras 910-913, 927-928, 932, 938, 953, 966, 975, 978.
[782] Trial Judgement, para. 966.

position of authority".[783] The Appeals Chamber accepts that an order does not necessarily need to be explicit in relation to the consequences it will have.[784] However, the Appeals Chamber is not satisfied that the Trial Chamber established beyond reasonable doubt that Milošević instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.

268. Although Milošević does not explicitly challenge his responsibility for planning the crimes under this ground of appeal, the Appeals Chamber takes note of his relevant submissions under other grounds[785] and decides to address the issue within the present Section of the Judgement. In this regard, the Appeals Chamber recalls that the *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[786] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[787] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[788]

269. The Appeals Chamber reiterates that the campaign of sniping and shelling civilians in Sarajevo was already in place when Milošević took the SRK command over from Galić.[789] Although this cannot be determinative in the present case, the Appeals Chamber finds it instructive to note that Galić was held responsible for ordering the indicted crimes, but not for planning them. Conversely, Milošević, although found not having "devise[d] a strategy for Sarajevo on his own"[790]

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[783] *Galić* Appeal Judgement, para. 176. See also, *Nahimana et al.* Appeal Judgement, para. 481, referring to *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras 28-30.

[784] *Cf. Nahimana et al.* Appeal Judgement, para. 481: "Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order." See also, *Galić* Appeal Judgement, paras 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[785] See *e.g.*, Defence Appeal Brief, paras 41, 42-99 and p. 94.

[786] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, para. 26.

[787] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément déterminant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".

[788] *Nahimana et al.* Appeal Judgement, para. 479, referring to *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[789] *Galić* Trial Judgement, paras 746-747. The findings remained undisturbed on appeal.

[790] Trial Judgement, para. 960.

and having "acted in furtherance of orders by the VRS Main Staff",[791] was convicted for both planning and ordering the campaign of shelling and sniping of civilians in Sarajevo during the Indictment period, subsequent to Galić's term in command.

270. With respect to the *actus reus* of planning, the Trial Chamber held that Milošević "was able to implement the greater strategy in a manner he saw fit".[792] It is unclear from these findings whether Milošević was found to have participated in the design of the military strategy concerning the ongoing campaign as such or whether he planned each and every incident for which he is held responsible by the Trial Chamber.[793] The Appeals Chamber further finds that it is unclear what specific evidence was relied upon by the Trial Chamber to come to these conclusions. In light of these uncertainties, the Appeals Chamber finds that Milošević's responsibility for planning of the campaign of sniping and shelling of civilians in Sarajevo as such could not be established beyond reasonable doubt.

271. The Appeals Chamber emphasizes that its findings above pertain strictly to Milošević's individual criminal responsibility for ordering and planning the campaign of shelling and sniping of civilians in Sarajevo as such, given that not all the legal requirements necessary for these modes of liability have been established at trial. These findings do not affect the conclusions of the Trial Chamber or those of the *Galić* Trial and Appeal Chambers that such a campaign took place in Sarajevo during the relevant period.

(b) Shelling incidents

272. The Trial Chamber established that Milošević ordered air bombs and distributed them between different SRK brigades, and that he ordered the construction of launchers of modified air bombs that were used by the SRK throughout its zone of responsibility in Sarajevo.[794] The Trial

[791] Trial Judgement, para. 961.
[792] Trial Judgement, para. 960.
[793] *Cf. Brđanin* Trial Judgement, para. 357: "[r]esponsibility for [planning] a crime could […] only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. […]" and para. 358: "Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it. […] the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the concrete crimes. This requirement of specificity distinguishes 'planning' from other modes of liability. […]" (footnotes omitted).
[794] Trial Judgement, para. 964, referring to Exhibits P663, P714, P722, P767. The Appeals Chamber notes that the Trial Chamber also referred to Exhibit P768, which is an order issued by the

Chamber further concluded that Milošević controlled the SRK shelling activities in general and, in particular, issued orders pertaining to positions of artillery pieces and to artillery ammunition.[795] The Trial Chamber also heard evidence with respect to medium and heavy mortars that they would not be moved "unless this is ordered 'by the commander'".[796] Finally, the Trial Chamber established on the basis of direct evidence that Milošević planned and ordered the shelling in two specific incidents – the shelling of the TV Building and the shelling of Hrasnica neighbourhood on 7 April 1995.[797]

273. On the basis of this evidence coupled with the established fact that Milošević was directly involved in the use and deployment of air modified bombs and issued orders regarding their use from as early as August 1994,[798] the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude beyond reasonable doubt that all the shelling involving modified air bombs and mortars fired by the SRK in Sarajevo during the Indictment period could only occur pursuant to Milošević's orders. Furthermore, considering that modified air bombs were a highly inaccurate weapon, sometimes even described as uncontrollable, yet with extremely high explosive force,[799] the Appeals Chamber finds that it was not unreasonable to establish that Milošević possessed the required *mens rea* for ordering the crimes of terror and crimes against humanity, either deliberately targeting civilians or attacking them indiscriminately.[800]

274. However, the Appeals Chamber notes that the Trial Chamber's conclusions that Milošević planned the shelling incidents are based on essentially the same set of facts. In the circumstances of this case, the Appeals Chamber *proprio motu* finds that Milošević's responsibility for ordering fully

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SRK deputy commander in Milošević's absence. The Appeals Chamber will address the issue of Milošević's absence from Sarajevo under Section XI.B.2 below.

[795] Trial Judgement, paras 818-819, referring to Ghulam Muhammad Mohatarem, 19 Jan 2007, T. 704; W-46, 15 Mar 2007, T. 3816-3817, 3830-3831 (closed session), 16 Mar 2007, T. 3853 (closed session); Borislav Kovačević, 9 July 2007, T. 7906; T-53, 11 Jun 2007, T. 6460-6461, 6464-6465; Predrag Trapara, 27 Jun 2007, T. 7414; and Exhibits P667, P687, P697, P710, P729. See also, Trial Judgement, para. 102, referring to Exhibits P716, P907.

[796] Trial Judgement, para. 90, referring to Richard Higgs, 23 Apr 2007, T. 5005-5506 and 24 Apr 2007, 5077-5078.

[797] Trial Judgement, paras 491 (referring to Exhibit P226), 495, 615 (referring to Exhibits P42, P152), 622, 964. See also, *id.*, paras 854 (referring to Exhibit P226), 857 (referring to Exhibit D186, p. 2).

[798] Trial Judgement, para. 822, referring to Exhibits P665, P696, P891, p. 13; P892, pp. 1-2.

[799] Trial Judgement, paras 97-100.

[800] Trial Judgement, paras 905, 907, 970-971, 978.

encompasses his criminal conduct and thus does not warrant a conviction for planning the same crimes.[801]

(c) Sniping incidents

275. The Trial Chamber inferred that Milošević planned and ordered sniping incidents from the fact that he was in charge of sniping activities in general.[802] To illustrate this conclusion, the Trial Chamber referred to the fact that "sniping occurred over an extended period of time in different areas of Sarajevo on territory under control of different SRK brigades", thus showing that the operation of snipers was coordinated by Milošević, and that he issued "numerous orders relating to training, equipment and the deployment of snipers".[803] The Trial Chamber noted that it had not been presented with "any written order [from Milošević] unequivocally ordering the sniping of civilians" but concluded that "the entire sniping campaign was under [Milošević's] control.[804] The Appeals Chamber has already overturned the Trial Chamber's findings with respect to ordering and planning such a campaign as a whole due to the lack of evidence allowing to establish beyond reasonable doubt the existence of such order in any form.[805]

276. To establish that Milošević ordered all the sniping incidents attributed to the SRK by the Trial Judgement, the Trial Chamber further took into account the facts that Milošević (i) signed the Anti-sniping agreement of 14 August 1994 as one of his first actions when he became the commander of the SRK and had been involved in the negotiations before then;[806] and (ii) signed an order to stop sniping.[807] The Appeals Chamber finds that the Trial Chamber abused its discretion by taking into account instances where Milošević acted towards preventing the sniping as proof of him planning and ordering the sniping of civilians. The Trial Chamber also referred to "an order for combat readiness and to draw up a firing plan onto the Old Town" as examples of Milošević

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[801] *Cf.*, with respect to ordering and aiding and abetting, *Kamuhanda* Appeal Judgement, para. 77, referring to *Semanza* Appeal Judgement, paras 353, 364; and, with respect to planning and committing, *Brdanin* Trial Judgement, para. 268, referring to *Blaškić* Trial Judgement, para. 278; *Kordić and Čerkez* Trial Judgement, para. 386.
[802] Trial Judgement, para. 962.
[803] Trial Judgement, para. 962.
[804] Trial Judgement, para. 962.
[805] See *supra*, paras 266-267, 270.
[806] Trial Judgement, para. 962. See also, *id.*, paras 815-816.
[807] Trial Judgement, para. 962. The Appeals Chamber notes that, although the Trial Chamber took this order into account to conclude that Milošević ordered sniping, it decided to disregard it as evidence of him trying to stop sniping on the basis that the order was given "virtually at the end of the conflict" (*id.*, para. 966).

planning and ordering the sniping.[808] However, in the absence of any mention of an exhibit or witness testimony, the Appeals Chamber is unable to discern what exactly the Trial Chamber was citing to.

277. Unlike the manner in which control was exercised over shelling activities, the Trial Chamber noted that Milošević "would issue general orders as to how to engage a target and the lower level commander would then organise the firing position. The organisation of firing systems at the positions was done by the squad, regiment, battalion or platoon commanders."[809] Unlike the use of "uncontrollable" modified air bombs, snipers are generally precise in hitting the target.[810] Moreover, the Trial Chamber heard "evidence that not all the sniping of civilians was intentional".[811] In these circumstances, the Appeals Chamber concludes that the inference that Milošević ordered all sniping incidents attributed to the SRK snipers by the Trial Judgement is not the only reasonable one on the ground that he generally controlled the sniping activity and training. The Appeals Chamber therefore quashes Milošević's convictions for ordering and planning the crimes related to the sniping incidents.

(d) Responsibility under Article 7(3) of the Statute

278. However, the Appeals Chamber notes that its findings above do not exclude Milošević being held responsible for the sniping incidents under Article 7(3) of the Statute. The Appeals Chamber notes that the Indictment alleges Milošević's responsibility for planning and ordering the crimes charged (and in addition or in the alternative, for aiding and abetting the planning, preparation and/or execution of the crimes), as well as for the crimes committed by his subordinates which he knew or had reason to know about and failed to take reasonable and necessary measures to prevent or punish.[812]

279. The Trial Chamber concluded that there was a conflict between the Indictment and the Prosecution Closing Brief as to whether Milošević was charged under Article 7(3) in the alternative, or in addition to, Article 7(1).[813] The Trial Chamber did not pursue the discussion with respect to

[808] Trial Judgement, para. 962.
[809] Trial Judgement, para. 813 (footnotes omitted), referring to Stevan Veljović, 31 May 2007, T. 5955-5956.
[810] *Cf.* Trial Judgement, para. 207, referring to Patrick Van der Weijden, 29 Mar 2007, T. 4278-4280, 4286-4287.
[811] Trial Judgement, para. 205, referring to Mirza Sabljića, 19 Apr 2007, T. 4756, 4758; W-138, 1 Feb 2007, T. 1413-1414; David Fraser, 8 Feb 2007, T. 1866, 1875-1876.
[812] Indictment, paras 19-21.
[813] Trial Judgement, paras 982-984.

Milošević's alleged responsibility under Article 7(3) given that it found him guilty under Article 7(1).[814] The Appeals Chamber recalls that both cumulative and alternative charging on the basis of the same conduct are generally permissible[815] and is satisfied that Milošević's responsibility under Article 7(3) was correctly pleaded in the present case.

280. The Appeals Chamber recalls that in order to establish individual criminal responsibility under Article 7(3), the following factors must be established beyond reasonable doubt:

> […] (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish the commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[816]

Furthermore, it has been previously established that

> […] a superior's authority to issue orders does not *automatically* establish that a superior had effective control over his subordinates, but is one of the indicators to be taken into account when establishing the effective control. As the Appeals Chamber held in *Halilović*, in relation to such capacity, "the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators". […][817]

> […] whether a given form of authority possessed by a superior amounts to an indicator of effective control depends on the circumstances of the case. For example, with respect to the capacity to issue orders, the nature of the orders which the superior has the capacity to issue, the nature of his capacity to do so as well as whether or not his orders are actually followed would be relevant to the assessment of whether a superior had the material ability to prevent or punish.[818]

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[814] Trial Judgement, para. 984, referring to *Blaškić* Appeal Judgement, para. 91; *Krštić* Trial Judgement, paras 605, 652 and *Krštić* Appeal Judgement, fn. 250; *Kordić and Čerkez* Appeal Judgement, para. 34; *Kvočka et al.* Appeal Judgement, para. 104; *Kajelijeli* Appeal Judgement, paras 81, 82; *Naletilić and Martinović* Appeal Judgement, para. 368.

[815] *Naletilić and Martinović* Appeal Judgement, paras 102-103.

[816] *Nahimana et al.* Appeal Judgement, para. 484, citing *Halilović* Appeal Judgement, paras 59 and 210; *Gacumbitsi* Appeal Judgement, para. 143; *Blaškić* Appeal Judgement, paras 53-85; *Bagilishema* Appeal Judgement, paras 24-62; *Čelebići* Appeal Judgement, paras 182-314.

[817] *Strugar* Appeal Judgement, para. 253 (footnote omitted), citing *Halilović* Appeal Judgement, paras 68, 70, 139, 204.

[818] *Strugar* Appeal Judgement, para. 254 (footnote omitted), referring to *Halilović* Appeal Judgement, paras 191-192; *Hadžihasanović and Kubura* Appeal Judgement, paras 199-201.

Finally, the Appeals Chamber reiterates that "it is not necessary for the accused to have had the same intent as the perpetrator of the criminal act; it must be shown that the accused 'knew or had reason to know that the subordinate was about to commit such act or had done so'".[819]

281. The Appeals Chamber is satisfied that, although the Trial Chamber did not convict Milošević under Article 7(3) of the Statute, it made the findings necessary for the establishment of his responsibility under this provision for the sniping incidents. In this regard, the Appeals Chamber first notes that the Trial Chamber established that the crime of terror and the charged crimes against humanity were committed in the context of the sniping incidents.[820] Second, the Appeals Chamber is satisfied on the basis of the evidence examined by the Trial Chamber and its relevant conclusions made throughout the discussion of Milošević's role,[821] that he was *de jure* and *de facto* superior of the SRK troops, including the snipers, throughout the Indictment period and had effective control over them. Third, the Trial Chamber found that Milošević knew or had reasons to know that the said crimes were going to be committed and had been committed.[822] Lastly, having analysed the relevant sections of the Trial Judgement read as a whole, the Appeals Chamber considers that the Trial Chamber concluded that Milošević did not take the necessary and reasonable measures to prevent or punish the commission of those crimes by his subordinates.[823] Having applied the correct legal framework to the conclusions of the Trial Chamber,[824] the Appeals Chamber is satisfied that Milošević's responsibility under Article 7(3) of the Statute for having failed to prevent and punish the said crimes committed by his subordinates is established beyond reasonable doubt.

3. Conclusion

282. In light of the foregoing, the Appeals Chamber upholds Milošević's convictions for ordering the shelling of the civilian population in Sarajevo during the Indictment period (counts 1, 5 and 6 of the Indictment),[825] quashes his conviction for planning the same crimes, and replaces Milošević's convictions for planning and ordering the sniping of the civilian population with respective

[819] *Nahimana et al.* Appeal Judgement, para. 865, citing Article 6(3) of the ICTR Statute.
[820] Trial Judgement, paras 911, 932, 938, 953.
[821] Trial Judgement, paras 802-807, 812-816, 959, 962, 966.
[822] Trial Judgement, paras 845-852.
[823] Trial Judgement, paras 859-867.
[824] *Cf. Stakić* Appeal Judgement, paras 63, 104.
[825] Subject to the Appeals Chamber's findings below with respect to the period of Milošević's absence from Sarajevo (see *infra*, Section XI.B.2).

convictions under Article 7(3) of the Statute (counts 1, 2 and 3 of the Indictment). The impact of these conclusions on sentencing, if any, will be discussed in the relevant section below.[826]

B. Milošević's responsibility for the incidents occurred during his absence from Sarajevo

1. Arguments of the parties

283. The Appeals Chamber now turns to consider Milošević's argument, raised under his fourth ground of appeal, that he cannot be held responsible for planning and ordering incidents that took place between 6 August and 10 September 1995.[827] In this regard, he submits that the Trial Chamber erroneously established a rule according to which the inability to act must last for a certain period of time in order to relieve a person from criminal responsibility.[828] Consequently, he asserts that the Appeals Chamber should not consider the SRK attacks against civilians during the aforementioned period in its assessment of his culpability.[829] In support of his assertion, Milošević refers to the evidence cited by the Trial Chamber in footnote 2908 of the Trial Judgement, notably the orders signed and issued by Čedomir Sladoje during the period when Milošević was hospitalized in Belgrade.[830] In response to the Appeals Chamber's question,[831] Milošević argued that the Trial Chamber failed to take into account the fact that there was no single incident during the period from September until November 1995, which would fall under the campaign pattern, and that upon his return, Milošević "did everything possible to regulate things on the ground".[832]

284. The Prosecution argues that the Trial Chamber correctly found that the incidents that took place during the period in question were part of the overall plan and the general orders given by Milošević.[833] It contends that contrary to Milošević's submission, the Trial Chamber did not find that it was impossible for him to act during the time he was in Belgrade. However, once it was established that the crimes that took place during his absence were part of the campaign he planned and ordered, it became unnecessary to determine whether it was possible for him to issue orders

[826] See *infra*, Section XII.D.1.
[827] See *supra*, Section VI.D.
[828] Defence Appeal Brief, para. 155. See also, AT. 84.
[829] Defence Appeal Brief, para. 157.
[830] AT. 84, referring to Trial Judgement, fn. 2908 and Exhibits P732, P733, P734.
[831] *Addendum* to the Order Scheduling the Appeals Hearing, 6 July 2009, p. 3, para. 2.
[832] AT. 85.
[833] Prosecution Response Brief, para. 86, referring to Trial Judgement, paras 975, 977. See also AT. 95 *et seq.*

during that period.[834] In the same vein, the Prosecution argues that Milošević's mere absence from the crime site did not relieve him of criminal responsibility.[835]

285. During its oral submissions, the Prosecution did not dispute the fact that during Milošević's absence, Sladoje was in charge as deputy commander issuing orders signed by him *in lieu* of the commander.[836] At the same time, noting that there is no document in evidence setting out Sladoje's appointment and mandate, the Prosecution insists that Milošević remained *de jure* commander of the SRK during his absence, which was only temporary with the expectation that Milošević would come back after the surgery, as he did.[837] The Prosecution refers to three factors that allegedly underlie the inference that Milošević had in fact instructed Sladoje to continue the campaign of shelling and sniping: (i) Milošević's style of leadership and his general attitude as the commander, including the fact that he always coordinated his actions with Sladoje who was his *alter ego*; (ii) the continuation of shelling and sniping during Milošević's absence in the same manner; and (iii) lack of reaction upon Milošević's return to Sarajevo.[838] The Prosecution also points to the facts that Milošević did not leave for the medical treatment on an emergency basis,[839] and that shortly before he left, Milošević had requested the Main Staff of the VRS to approve the issuance of 200 air bombs, some of which were used during his absence.[840]

286. Milošević replies that he cannot be held responsible for shelling and/or sniping incidents that took place during his absence, including that of Markale Market.[841] He points to Exhibit P738 arguing that it shows that he "directly expressed his displeasure at being replaced or substituted".[842] He further refers to the Law on the Army of Republika Srpska applicable during the Indictment period according to which "[a] senior officer who is temporarily prevented from carrying out his duties is being assigned with a replacement or a substitute".[843] Milošević insists that the Prosecution's argument that he had instructed Sladoje to continue the sniping and shelling

[834] Prosecution Response Brief, para. 88; AT. 101.
[835] Prosecution Response Brief, paras 87-88.
[836] AT. 96, referring to Exhibits P732, P734, P768.
[837] AT. 97, referring to Trial Judgement, para. 959 and Luka Dragičević, 26 Mar 2007, T. 3999.
[838] AT. 98-101.
[839] AT. 99.
[840] AT. 100.
[841] AT. 133.
[842] AT. 133-134.
[843] AT. 134. The Prosecution objected to this reference on the grounds that the text of the law was neither in evidence in this case, nor judicially noticed or form part of the agreed facts (AT. 135-136).

campaign was not presented at trial in relation to the alibi defence, in which case Sladoje should have been called to testify on the matter himself.[844]

2. Analysis

287. At the outset, the Appeals Chamber is not convinced that Milošević's relevant arguments in fact qualify for a "defence of alibi" under Rule 67(B)(i)(a) of the Rules[845] and takes the view that the Trial Chamber should not have addressed them as alibi. In this regard, the Appeals Chamber recalls that

> […] when a defendant pleads an alibi, he is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission. The Appeals Chamber recalls that 'it is settled jurisprudence before the two *ad hoc* Tribunals that in putting forward an alibi, a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case. The burden of proving beyond reasonable doubt the facts charged remains squarely on the shoulders of the Prosecution. Indeed, it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true'.[846]

288. In the present case, Milošević's absence from Sarajevo during the relevant period is undisputed by the parties and is not as such incompatible with holding Milošević criminally responsible for the crimes occurred during his absence. However, the Appeals Chamber understands that the Trial Chamber only referred to the term "alibi" to reflect Milošević's submissions but did not apply the alibi legal standards in its discussion. This conclusion is supported by the language used in the relevant parts of the Trial Judgement,[847] the remarks made by the Presiding Judge during the presentation of the parties' closing arguments,[848] and the substance

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[844] AT. 137.

[845] In addition, the Appeals Chamber recalls its finding that this provision "is not happily phrased" and that "[i]t is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true." (*Čelebići* Appeal Judgement, paras 580-581). Hence, the Trial Chamber should not have referred to the alibi as a "defence".

[846] *Kajelijeli* Appeal Judgement, para. 42 (internal quotations and footnotes omitted), quoting *Niyitegeka* Appeal Judgement, para. 60. See also, *Nahimana et al.*, para. 417; *Čelebići* Appeal Judgement, para. 581; *Musema* Appeal Judgement, para. 202; *Kayishema and Ruzindana* Appeal Judgement, para. 113.

[847] Trial Judgement, paras 827-832, 972-977.

[848] 9 Oct 2007, T.9435: "Mr. Docherty, I want to go back to the issue of what you call the Defence argument about an alibi, although it doesn't appear to me to be -- to be a question of alibi at all. When the accused went to hospital to have his eye treated, at that time the evidence is, if my

of the analysis as shown below. Therefore, the Appeals Chamber considers that the use of the term "alibi" in the Trial Judgement did not result in a legal error invalidating the relevant findings.

289. The Trial Chamber concluded that it was satisfied beyond reasonable doubt that the crimes committed between 6 August and 10 September 1995 were attributable to Milošević, despite the fact that his responsibilities had been taken over by Sladoje, the SRK Chief of Staff.[849] It based its conclusion on the fact that the crimes that took place in Milošević's absence fell squarely within the overall pattern of the campaign he had planned and ordered.[850] In light of this consideration coupled with the fact that Milošević's absence was limited in time, the Trial Chamber inferred that the shelling and sniping during the said period were indeed planned and ordered by Milošević.[851] For the reasons provided in the preceding paragraph, the Appeals Chamber will not address Milošević's arguments on appeal related to the legal standard applicable to alibi. The Appeals Chamber will however proceed to analyse whether the said Trial Chamber's findings on Milošević's responsibility during the relevant period are correct.

290. The Appeals Chamber recalls that ordering requires that a person in a position of *de jure* or *de facto* authority instructs another person to commit a crime.[852] It does not, however, require the physical presence of the perpetrator at the site of the crime. The question before the Appeals Chamber is whether Milošević can be held responsible for ordering the crimes that took place during his absence. The incidents at stake are the shelling of the BITAS building on 22 August 1995 and that of the Markale Market on 28 August 1995, which was the last incident charged in the Indictment. When Milošević came back to Sarajevo, the conflict was virtually over.[853]

291. The Appeals Chamber recalls that Milošević's predecessor, Galić, was found to be responsible for ordering the campaign of sniping and shelling from 10 September 1992 until 10 August 1994, when Milošević took over his position and became in charge of the SRK troops in Sarajevo. While Milošević was hospitalized in Belgrade, the person in charge of the SRK command

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recollection is correct, that the authority and control had been transferred to his deputy, so that he was not in de jure control of the operations. So I don't see this really as raising a question of alibi. It is simply that he lacked the de jure authority. […]".

[849] Trial Judgement, para. 975.

[850] Trial Judgement, para. 975.

[851] Trial Judgement, paras 976-977.

[852] Trial Judgement, para. 957. See *Kordić and Čerkez* Appeal Judgement, para. 28.

[853] *Cf.* Trial Judgement, para. 966. The last sniping incident imputed to Milošević by the Trial Judgement took place in March 1995 (*id.*, para. 378).

in Sarajevo was his Chief of Staff, Sladoje, who issued orders *in lieu* of the commander.[854] The Trial Chamber was not presented with any evidence concerning the exact nature of Sladoje's mandate, but it was satisfied that Sladoje was "in charge". Therefore, Milošević's position of authority during the period at stake is questionable.[855] The Appeals Chamber finds that, even though Milošević formally preserved his rank and duties, the position of authority on the ground belonged to the stand-in commander, albeit temporarily.[856]

292. The Prosecution suggests that it can be inferred from the totality of the evidence that prior to his departure, Milošević instructed Sladoje to continue the campaign in his absence.[857] However, the Appeals Chamber observes that this argument was not part of the Prosecution's case at trial[858] and was thus not considered by the Trial Chamber. In any case, the Appeals Chamber is not convinced that such inference would be the *only* reasonable one from the evidence pointed by the Prosecution.[859] The Appeals Chamber reiterates that the *actus reus* of ordering requires proof of a positive action by the person in a position of authority, *i.e.* instructing another person to commit an offence.[860] The Trial Chamber did not establish the existence of such prior positive act emanating from Milošević with respect to the shelling of the BITAS building and the Markale Market occurred during his absence.

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[854] *E.g.* P732, P733, P734, P768.

[855] *Cf.* Judge Robinson's remark during the Prosecution's Closing Arguments, *supra*, fn. 859.

[856] *E.g.*, Stevan Veljović, 30 May 2007, T. 5831: "The Chief of Staff was, at the same time, a corps deputy commander. In the absence of the commander, he was at the head of the Corps Staff. […] When acting as a deputy, he was in charge."; T. 5843: "Q. And who was in charge of the corps when Dragomir Milosevic went for treatment in Belgrade? A. His deputy, Colonel Cedomir Sladoje [*sic*]".

[857] AT. 98-100.

[858] *Cf.* Prosecution Closing Statement, 9 Oct 2007, T. 9433-9437.

[859] AT. 98-100, referring to (i) Stevan Veljović's testimony according to which "the two of them [Milošević and Sladoje] always coordinated the approach", Sladoje was Milošević's "*alter ego*" and "they were very close to each other"; (ii) Trial Judgement, para. 829 and Exhibit D340 confirming that Milošević did not leave for surgery on an emergency basis and that the treatment was put off due to the situation on the front (see also, Luka Dragičević, 26 Mar 2007, T. 3999); (iii) testimony of Luka Dragičević attesting Milošević's general attitude as commander and the fact that he cut his sick leave short (*ibid.*); (iv) the Trial Chamber's findings that the shelling and the sniping continued during Milošević's absence in the same manner as before; (v) Trial Judgement, para. 822 establishing that Milošević requested the Main Staff of the VRS to approve the issuance of 200 air modified bombs; and (vi) the Trial Chamber's findings and witness testimony stating the Milošević was fully informed of the situation upon his return and did not report any violation of international humanitarian law to the military prosecutors.

[860] *Galić* Appeal Judgement, para. 176.

293. The Appeals Chamber further finds that it was unreasonable for the Trial Chamber to infer that Milošević ordered the shelling of the BITAS building and the Markale Market on the mere basis that the incidents in question were similar to the ones that took place in his presence and thus were part of "the overall plan and general orders of [Milošević]".[861] Consequently, the Appeals Chamber quashes the Trial Chamber's findings in this regard and acquits Milošević of the crimes related to the shelling of the BITAS building on 22 August 1995 and that of the Markale Market on 28 August 1995.

C. Conclusion

294. In light of the foregoing, the Appeals Chamber grants Milošević's twelfth and fourth grounds of appeal in part and (i) upholds Milošević's convictions for ordering the shelling of the civilian population in Sarajevo during the Indictment period, except for the shelling of the BITAS building on 22 August 1995 and that of the Markale Market on 28 August 1995 (counts 1, 5 and 6 of the Indictment);[862] (ii) quashes his conviction for planning the same crimes; and (iii) replaces Milošević's convictions for planning and ordering the sniping of the civilian population with respective convictions under Article 7(3) of the Statute (counts 1, 2 and 3 of the Indictment). The impact of these conclusions on sentencing, if any, will be discussed in the relevant section below.[863]

[861] Trial Judgement, para. 977.

[862] The Appeals Chamber further recalls that it granted in part Milošević's eighth ground of appeal quashing his conviction for the crimes associated with the shelling of the Baščaršija Flea Market on 22 December 1994 (see *supra*, Section IX.B.3).

[863] See *infra*, Section XII.D.

XII. SENTENCING

295. The Trial Chamber found Milošević guilty of terror as a violation of the laws or customs of war (Count 1), murder as a crime against humanity (Counts 2 and 5), and of inhumane acts as a crime against humanity (Counts 3 and 6), and sentenced him to a single sentence of 33 years of imprisonment.[864] Both Milošević and the Prosecution appealed the sentence.

A. Standard for appellate review on sentencing

296. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general factors that a Trial Chamber is required to take into account: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offence; (iii) the individual circumstances of the convicted person (including aggravating and mitigating circumstances); and (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[865]

297. Due to their obligation to individualise the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Chambers are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances.[866] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[867]

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[864] Trial Judgement, paras 1006, 1008.
[865] *Mrkšić and Šljivančanin* Appeal Judgement, para. 351; *Strugar* Appeal Judgement, para. 335.
[866] *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302.
[867] See*, e.g.*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Martić* Appeal Judgement, para. 326; *Strugar* Appeal Judgement, paras 336-337.

B. Milošević's Fifth Ground of Appeal

1. Arguments of the parties

298. Under his fifth ground of appeal, Milošević submits that the Trial Chamber erroneously considered a constitutive element of an offence to be an aggravating factor of the same offence, thus violating Article 24 of the Statute. He argues that "the violation of humanitarian law, attacks against civilians or the indiscriminate use of weapons" are constitutive elements of the crimes for which he was convicted and therefore may not be considered aggravating circumstances. In particular, he argues that the Trial Chamber erred in considering the abuse of his position of authority in aggravation of his sentence. In his view, a commander's order in contravention of international humanitarian law necessarily implies an abuse of position of authority, thus making impermissible the consideration of the latter as an aggravating factor.[868] Accordingly, he submits that the Trial Chamber erred in law in paragraphs 999, 1000, and 1001 of the Trial Judgement in considering those elements as aggravating circumstances.[869]

299. The Prosecution responds that the Trial Chamber did not consider a "violation of humanitarian law" or "attacks on civilians" as aggravating circumstances. Rather, it took into account Milošević's abuse of his position, the duration of the campaign,[870] and the use of indiscriminate weapons. With respect to the latter, it submits that the use of indiscriminate weapons is not an element of the crimes of terror or unlawful attacks and that the modified air bomb's indiscriminate nature, combined with its devastating explosive power, were properly characterised as aggravating circumstances.[871] Concerning Milošević's abuse of position, the Prosecution submits that the Trial Chamber did not err in taking it into account as an aggravating factor. In its view, the Trial Chamber considered Milošević's abuse of his very high position of authority as SRK commander through ordering the commission of systematic violations of international humanitarian law.[872]

[868] AT. 82, 125.
[869] Defence Appeal Brief, para. 158.
[870] Prosecution Response Brief, paras 90-94.
[871] Prosecution Response Brief, paras 90 and 95-96.
[872] AT. 104, 123.

2. Analysis

(a) Alleged double-counting between the elements of the crime and the aggravating circumstances

300. In paragraph 999 of the Trial Judgement, the Trial Chamber concluded that the evidence showed that Milošević "abused his position [as commander of the SRK] and that he, through his orders, planned and ordered gross and systematic violations of humanitarian law". The Appeals Chamber acknowledges that, read in isolation, the formulation used by the Trial Chamber could be interpreted to mean that Milošević's abuse of position *and* the fact that he planned and ordered gross and systematic violations of humanitarian law through his orders were both considered to be aggravating circumstances.

301. The Appeals Chamber notes, however, that paragraph 999 of the Trial Judgement relates exclusively to Milošević's position as a commander and to his ensuing obligations under international humanitarian law. Read in its proper context, the Appeals Chamber understands the Trial Chamber's reference to Milošević's planning and ordering of gross and systematic violations of humanitarian law through his orders as simply exemplifying Milošević's abuse of position, which was the specific aggravating circumstance examined in paragraph 999 of the Trial Judgement. Thus, although the Trial Chamber's wording could have been clearer, the Appeals Chamber is satisfied that the Trial Chamber did not consider Milošević's violations of humanitarian law as an aggravating circumstance. Rather, the Trial Chamber limited itself to Milošević's abuse of his superior position.

302. With regard to the latter, the Appeals Chamber recalls that it is settled jurisprudence of this Tribunal that while a position of authority, even at a high level, does not automatically warrant a harsher sentence, the *abuse* of such may indeed constitute an aggravating factor.[873] The Appeals Chamber further reiterates, Judge Liu dissenting, that this holds true in the context of a conviction under Article 7(1) of the Statute, including the mode of responsibility for planning and ordering

[873] See, *e.g.*, *Martić* Appeal Judgement, para. 350; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Blagojević and Jokić* Appeal Judgement, para. 324; *Stakić* Appeal Judgement, para. 411; *M. Nikolić* Appeal Judgement, para. 61. Moreover, the Appeals Chamber recalls that where responsibility under both Article 7(1) and Article 7(3) is alleged under the same counts, and where the legal requirements pertaining to both of these modes of responsibility have been established, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing (*Blaškić* Appeal Judgement, paras 91, 727).

crimes.[874] Before arriving at its conclusion, the Trial Chamber in the instant case specifically took into account Milošević's high rank within the VRS, the ensuing special responsibility to uphold the standards of international humanitarian law, and the fact that he was highly respected by the SRK staff.[875] In this regard, the Appeals Chamber recalls that whereas the mode of liability of ordering requires that the person giving the order has a position of authority, the abuse of such authority may still be considered an aggravating factor in sentencing.[876] The Trial Chamber was mindful of the fact that the superior position *per se* does not constitute an aggravating factor and did not consider Milošević's authority to give orders to that effect.[877] Rather, it took into account the particularly high level of Milošević's authority and the high esteem of his soldiers in assessing whether his conduct amounted to an abuse of his superior position. Milošević has failed to demonstrate any error in this regard.

303. The Appeals Chamber further notes that this finding is not affected by the Appeals Chamber's conclusion on Milošević's responsibility under Article 7(3) of the Statute for counts 1 (terror) in the part concerning the sniping of the civilian population, 2 (murder) and 3 (inhumane acts),[878] given that his responsibility pursuant to Article 7(1) of the Statute is upheld under counts 1 (terror) in the part concerning the shelling of the civilian population, 5 (murder) and 6 (inhumane acts).[879] In addition, the Appeals Chamber recalls that the superior's *abuse* of his position of a high level of authority may also be taken into consideration for a conviction under Article 7(3) of the Statute.[880]

304. With respect to the shelling and sniping of the civilian population, it transpires from paragraph 1000 of the Trial Judgement that the Trial Chamber did not consider these attacks as aggravating Milošević's culpability. Rather, the Trial Chamber considered the duration of the

[874] *Naletilić and Martinović* Appeal Judgement, paras 613, 626; *Blagojević and Jokić* Appeal Judgement, para. 324; *Stakić* Appeal Judgement, para. 411; *Blaškić* Appeal Judgement, para. 91.
[875] Trial Judgement, para. 999.
[876] *Galić* Appeal Judgement, para. 412.
[877] Trial Judgement, para. 996, fn. 3202.
[878] See *supra*, Section XI.A.3.
[879] *Cf. Naletilić and Martinović* Appeal Judgement, para. 626.
[880] *Hadžihasanović and Kubura* Appeal Judgement, para. 320. The Appeals Chamber notes that in *Naletilić and Martinović*, the Appeals Chamber found that the Trial Chamber erred in finding that Martinović's and Naletilić's respective superior positions constituted aggravating factors for their convictions under Article 7(3) (*Naletilić and Martinović* Appeal Judgement, paras 613, 626). However, the Appeals Chamber emphasizes that this finding was not concerned with the *abuse* of such position as is the case in the present instance.

campaign of the attacks, their terrorising effect on the population, and Milošević's active role in them as an aggravating circumstance, which it was entitled to do.[881]

305. With respect to Milošević's challenge to paragraph 1001 of the Trial Judgement where the Trial Chamber found that "the repeated use of the blatantly inaccurate modified air bomb" constituted an aggravating factor, the Appeals Chamber notes that the use of an indiscriminate weapon is not an element of the crimes of terror, murder, or inhumane acts but a factor that may be and was taken into account to establish the element(s) of those crimes. The Trial Chamber was therefore entitled to take into account the repeated use of such a weapon, as well as the fact that it was Milošević who introduced it, as aggravating factors.

(b) Double-counting in assessing the gravity of the crimes and the aggravating circumstances

306. While the Appeals Chamber is satisfied that the Trial Chamber did not consider elements of the crimes which Milošević was convicted of as aggravating circumstances, the Appeals Chamber observes that the language of the Trial Judgement may be read to conclude that certain factors were taken into account twice by the Trial Chamber in its assessment of the gravity of the crimes and the aggravating circumstances.[882] Where established, such double-counting amounts to a legal error since "factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*."[883] Although this issue was not explicitly raised by either party, the Appeals Chamber has considered that the interests of justice require it to address this matter *proprio motu*,[884] and invited the parties to present oral submissions in this regard.[885] At the Appeals Hearing, the Prosecution argued that "the Trial Chamber relied on different aspects under gravity and aggravating factors", rather than counting the same factors twice.[886] Milošević did not make any submissions directly addressing this question.

307. The Appeals Chamber observes that the Trial Chamber summarised the gravity of Milošević's crimes in concluding that "[b]y planning and ordering the crimes […] [he] acted in

[881] See, with respect to the duration of the campaign, *Martić* Appeal Judgement, para. 340; *Blaškić* Appeal Judgement, para. 686; *Kunarac* Appeal Judgement, para. 356; *cf.*, with respect to the active role, *M. Nikolić* Judgement on Sentencing Appeal, para. 61; *Kupreškić et al.* Appeal Judgement, para. 451.
[882] Trial Judgement, paras 991-994, 999-1001.
[883] *M. Nikolić* Judgement on Sentencing Appeal, para. 58; *Deronjić* Judgement on Sentencing Appeal, para. 106.
[884] See *Jokić* Judgement on Sentencing Appeal, para. 26; *Kordić and Čerkez* Appeal Judgement, para. 1031, and references cited therein.
[885] Addendum to the Order Scheduling the Appeals Hearing, 6 July 2009, p. 3.

direct breach of the basic principles of international humanitarian law".[887] Conversely, in relation to the aggravating circumstances, the Trial Chamber found that Milošević "abused his position and that he, through his orders, planned and ordered gross and systematic violations of international humanitarian law."[888] Although the Appeals Chamber has already concluded that these findings do not amount to double-counting with respect to the elements of the crimes or Milošević's responsibility for them, it finds that the abuse of his superior position is likely to have been counted twice – when considering the gravity of the crimes and aggravating circumstances.

308. Similarly, the Appeals Chamber observes that within the determination of the gravity of the crimes, the Trial Chamber considered that the SRK troops' behaviour was "characterised by indiscriminate shelling of civilian areas".[889] Additionally, as an aggravating factor, the Trial Chamber considered the "use of the blatantly inaccurate modified air bombs".[890] Likewise, in the context of its assessment of the gravity, the Trial Chamber described the immense terrorising effect of the shelling and sniping on the civilian population.[891] Subsequently, in determining the aggravating circumstances, the Trial Chamber noted that "the psychological effect of [the modified air] bombs was tremendous", thus emphasising its impact on the civilian population.[892] The Appeals Chamber finds these references to constitute impermissible double-counting.

309. The Appeals Chamber is not convinced by the Prosecution's argument that relying on different aspects of the same fact is permissible. In weighing a fact, either as an aspect of the gravity of the crime or as an aggravating circumstance, the Trial Chamber is required to consider and account all of its aspects and implications on the sentence in order to ensure that no double-counting occurs. The Appeals Chamber thus finds that the said facts could only be taken into consideration once – either as factors relevant to the gravity of the crimes or as aggravating circumstances.

3. Conclusion

310. For the foregoing reasons, the Appeals Chamber dismisses Milošević's fifth ground of appeal. The Appeals Chamber finds *proprio motu* that the Trial Chamber erred in taking into

[886] AT. 101.
[887] Trial Judgement, para. 994.
[888] Trial Judgement, para. 999.
[889] Trial Judgement, para. 991.
[890] Trial Judgement, para. 1001.
[891] Trial Judgement, paras 991-992.
[892] Trial Judgement, para. 1001.

account the same facts when assessing both the gravity of the crimes and the aggravating circumstances. The Appeals Chamber will address the impact of this conclusion on the sentencing, if any, in Sub-section D. below.

C. Prosecution's Appeal

311. Under its sole ground of appeal, the Prosecution submits that the Trial Chamber erred in law in imposing a sentence of 33 years imprisonment, which it argues was manifestly inadequate in the circumstances.[893] In its view, the sentence pronounced "underestimates the gravity of [Milošević's] criminal conduct and leads to the inexorable conclusion that the Trial Chamber failed to exercise its discretion properly".[894] It submits that "the only sentence which accurately reflects Milošević's responsibility is one of life imprisonment".[895] The Prosecution argues that the Trial Chamber erred in its assessment of the mitigating factors.[896] It submits that the Trial Chamber disregarded its findings on the gravity of the crimes and failed to give adequate weight to the form and degree of Milošević's participation in them.[897]

312. In response, Milošević generally submits that while the Prosecution considers the Trial Chamber bound by the sentencing principles espoused in the *Galić* Appeal Judgement, the Statute provides for the individualisation of a sentence.[898] He further contends that the Trial Chamber failed to establish beyond reasonable doubt most of the facts to which the Prosecution makes reference and the elements of the offences for which he was convicted.[899] In the alternative, he submits that the Appeals Chamber should take into account the mitigating circumstances raised by the Trial Chamber.[900]

313. In reply, the Prosecution submits that the Trial Chamber erred in imposing a "substantially more lenient" sentence than that imposed by the Appeals Chamber on Galić. According to the Prosecution, the individual circumstances of Milošević do not justify the disparity in sentence and

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[893] Prosecution Notice of Appeal, para. 2. See also Prosecution Appeal Brief, para. 2.
[894] Prosecution Appeal Brief, para. 2.
[895] Prosecution Appeal Brief, para. 2.
[896] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras 32-42.
[897] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras 5-31.
[898] Defence Response Brief, para. 4.
[899] Defence Response Brief, para. 5.
[900] Defence Response Brief, para. 6, referring to Trial Judgement, para. 1003 ("[…] The Trial Chamber will take into account the following factors in mitigation of the sentence that is to be imposed: the Accused voluntarily surrendered to the authorities of Serbia and Montenegro before being transferred to The Hague; David Fraser's evidence that the Accused appeared to be 'somewhat troubled by what he was doing'; Col. Dragičević's evidence that the Accused was an 'altruist' and Maj. Veljović's testimony that the Accused was a 'man of high moral values'; the negotiation and signing of the Anti-sniping Agreement by the Accused; and the orders issued by the Accused not to shoot civilians and to abide by the Geneva Conventions").

the Trial Chamber erroneously found that the circumstances set out in paragraph 1003 of the Judgment were mitigating.[901]

1. Mitigation

(a) Arguments of the Prosecution

314. The Prosecution submits that no mitigating factors existed to justify a sentence less than life imprisonment, particularly in view of the fact that mitigating circumstances do not automatically entitle an appellant to any credit in the determination of his sentence.[902]

315. First, the Prosecution argues that the Trial Chamber erred in finding that witness Fraser's evidence that Milošević was "somewhat troubled by what he was doing" constituted mitigation, particularly in the absence of any indication of remorse.[903] The Prosecution submits that, even if the finding were open to the Trial Chamber, no weight should have been given to this factor in mitigation.[904] Second, it submits that no weight should have been given to the remarks of Milošević's subordinates that he was an "altruist" and a "man of high moral values" given that he planned and ordered a campaign of terror against the entire population over 15 months, resulting in significant death and injury.[905] Third, the Prosecution submits that the Trial Chamber erred in finding that the fact that Milošević negotiated and signed the Anti-sniping Agreement, and that he occasionally issued orders not to shoot civilians and to abide by the Geneva Conventions constituted mitigation for which he deserved credit.[906] The Prosecution points to findings in the Trial Judgement that Milošević breached the Anti-sniping Agreement, violated temporary ceasefires, and planned and ordered breaches of the Geneva Conventions throughout the Indictment period.[907] Finally, the Prosecution submits that Milošević's voluntary surrender, delayed for over three years after the indictment was made public, should have been given very limited weight.[908]

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[901] Prosecution Reply Brief, paras 2-3.
[902] Prosecution Appeal Brief, paras 32-33.
[903] Prosecution Appeal Brief, paras 34-35. See also, AT. 146.
[904] Prosecution Appeal Brief, para. 36.
[905] Prosecution Appeal Brief, para. 37. See also, AT. 145-146.
[906] Prosecution Appeal Brief, para. 38. See also, AT. 146-147.
[907] Prosecution Appeal Brief, paras 38-41.
[908] Prosecution Appeal Brief, para. 42.

(b) Analysis

316. The Appeals Chamber recalls that neither the Statute nor the Rules exhaustively define the factors which may be considered in mitigation. Rather, what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion.[909] The Trial Chamber is endowed with a considerable degree of discretion in making this determination,[910] as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified.[911]

317. The Appeals Chamber considers that the Prosecution does not identify any discernible error in the exercise of the Trial Chamber's sentencing discretion beyond disagreeing with the Trial Chamber's determination of the mitigating factors. Although another Trial Chamber could have reasonably decided not to consider the above-mentioned factors as mitigating Milošević's guilt, the Appeals Chamber finds that the Trial Chamber acted within the scope of its discretion in doing so. The witness statements referred to by the Trial Chamber are accurate and, while they appear at odds with Milošević's conduct during the Indictment period, they shed light on Milošević's personal traits. Similarly, the fact that the SRK troops under Milošević's command repeatedly breached the Anti-sniping Agreement and violated temporary ceasefires and the Geneva Conventions did not preclude a reasonable Trial Chamber from considering that "the negotiation and signing of the Anti-sniping Agreement" and the "orders [Milošević issued] not to shoot civilians and to abide by the Geneva Conventions"[912] were mitigating circumstances. The Anti-sniping Agreement "was implemented to some extent"[913] and Milošević's orders were followed by his subordinates,[914] both of which tend to show that Milošević's acts in favour of humanitarian law might actually have had some positive effects.

318. The Trial Chamber indicated that it "will take [these factors] into account in mitigation of the sentence that is to be imposed",[915] which suggests that they were accorded some weight. Given the wide discretion accorded to Trial Chambers in this matter, the Appeals Chamber considers that

[909] See, *e.g.*, *Simba* Appeal Judgement, para. 328, quoting *Musema* Appeal Judgement, para. 395.
[910] See, *e.g.*, *Hadžihasanović and Kubura* Appeal Judgement, para. 325; *Simić* Appeal Judgement, para. 245; *Čelebići* Appeal Judgement, para. 780.
[911] See, *e.g.*, *Simić* Appeal Judgement, para. 258; *Kvočka et al.* Appeal Judgement, para. 675; *Simba* Appeal Judgement, para. 328.
[912] Trial Judgement, para. 1003.
[913] Trial Judgement, para. 962.
[914] Trial Judgement, para. 959.
[915] Trial Judgement, para. 1003.

it was within the Trial Chamber's discretion to do so. While there is no indication of the weight actually accorded to these mitigating factors by the Trial Chamber, there is no indication that they were given undue weight. The Appeals Chamber is of the view that the sentence of 33 years' imprisonment does not *per se* give rise to the inference that the Trial Chamber must have given them undue weight.

2. Gravity of the crimes and Milošević's role

(a) Arguments of the parties

319. The Prosecution argues that the Trial Chamber's description of the crimes confirms that it should have imposed a life sentence on Milošević.[916] It submits that tens of thousands of vulnerable civilians in Sarajevo were subjected to shelling and sniping, resulting in injury or death and making the most basic of daily tasks impossible to carry out.[917] It adds that these civilians "were already vulnerable and debilitated" due to the previous two years of siege and, nevertheless, Milošević continued the attack for another 15 months.[918] The Prosecution also points to the fact that the Trial Chamber found that Milošević's crimes were characterised by exceptional cruelty and brutality with consequences that will be felt for a lifetime.[919]

320. The Prosecution subsequently argues that while sniping and shelling resulted in individual victims of murder and other inhumane acts, the entire population of Sarajevo was a victim of the crime of terror.[920] It contends that the random and indiscriminate nature of the sniping and shelling placed the population under the constant threat of death, fear and insecurity, and left the civilians with lasting psychological scars.[921] Consequently, the Prosecution argues that the Trial Chamber erroneously restricted the victim group to those who were injured directly by a specific incident of sniping or shelling, which "had the effect that those who were not direct victims of a specific incident, but who were nevertheless terrorized by the campaign, were not considered for the purposes of the sentence".[922]

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[916] Prosecution Appeal Brief, para. 5. See also, AT. 147.
[917] Prosecution Appeal Brief, paras 6-7.
[918] Prosecution Appeal Brief, para. 8.
[919] Prosecution Appeal Brief, paras 5 and 9-15.
[920] Prosecution Appeal Brief, paras 16-21.
[921] Prosecution Appeal Brief, paras 17-18.
[922] Prosecution Appeal Brief, para. 21.

321. The Prosecution further submits that Milošević's "role was central and instrumental and deserved a life sentence".[923] It argues that Milošević controlled the overall strategy including the deployment and use of weapons, took decisions to violate the Total Exclusion Zone for heavy weapons, increased the brutality of the campaign with a clear intent to maximise the casualties inflicted, and introduced a new weapon, the modified air bomb, which had no military purpose but was instead designed to create fear and cause devastation.[924] The Prosecution relies on the Appeals Chamber's sentencing of Galić, who played a comparable role and was convicted to life imprisonment for similar crimes.[925] In its view, the individual circumstances of Milošević do not justify a substantially different sentence.[926]

322. In general, Milošević responds that it is premature to discuss the sentencing issues considering that he challenges the Trial Chamber's findings concerning his guilt.[927] He further submits that the sentence imposed on him by the Trial Chamber should not be compared with the one imposed on Galić considering that "[t]here are no two identical cases in criminal law".[928] He mentions that a life sentence sought by the Prosecution is in any case unnecessary considering his age.[929]

(b) Analysis

323. The Trial Judgement is replete with descriptions and related findings going to the gravity of the crimes. The Prosecution does not argue that the Trial Chamber erred in making these findings but argues that it improperly failed to take them into account and erred in the exercise of its discretion by rendering a manifestly inadequate sentence. A reading of the section on the gravity of the offence clearly shows that the Trial Chamber took into account all of the findings identified by the Prosecution. The Trial Chamber specifically referred to (i) the fact that many civilians were killed; (ii) the disregard for human life and integrity; (iii) the immense suffering endured by the civilians of Sarajevo; (iv) the terror that was caused; (v) the physical and psychological suffering victims still endure; and (vi) the fact that by planning and ordering the crimes for which he was found guilty Milošević made the entire civilian population of Sarajevo the direct target of countless

[923] Prosecution Appeal Brief, para. 22. See also *id.*, para. 30.
[924] Prosecution Appeal Brief, paras 23-29.
[925] Prosecution Appeal Brief, para. 30. AT. 147-149.
[926] Prosecution Appeal Brief, paras 31, 42.
[927] AT. 152-153.
[928] AT. 153.
[929] AT. 155.

acts of violence.[930] Merely reciting the Trial Chamber's findings on the gravity of the offence does not suffice to show that the Trial Chamber erred in the exercise of its discretion to determine an appropriate sentence.

324. With respect to the victims of the crime of terror, the Appeals Chamber considers that contrary to the Prosecution's claim, the Trial Chamber did not restrict the victims group to those who were directly injured by specific incidents. Read in context, the Trial Chamber's references to "[t]he civilians in Sarajevo" and to "[t]he resulting suffering of the civilian population" in paragraphs 992 and 993 of the Trial Judgement indicate that the Trial Chamber considered the entire population of Sarajevo a victim of the crime of terror. This is confirmed by the Trial Chamber's statement at paragraph 994 that "[b]y planning and ordering the crimes of terror, murder and inhumane acts, the Accused made the entire population of Sarajevo the direct target of countless acts of violence".

325. The Appeals Chamber notes that the Trial Chamber considered Milošević's active and central role in the commission of the crimes when discussing the sentence to be imposed.[931] By merely pointing out the Trial Chamber's findings on Milošević's role in the commission of the crimes, the Prosecution does not demonstrate that the Trial Chamber gave it insufficient weight and, as a result, ventured outside its sentencing discretion.

326. Regarding the comparison with the sentence imposed on Galić on appeal, the Appeals Chamber recalls that "sentences of like individuals in like cases should be comparable".[932] However, similar cases do not provide "a legally binding tariff of sentences".[933] While the Appeals Chamber does not discount the assistance that may be drawn from previous decisions, such assistance is often limited, as each case contains a multitude of variables.[934] Differences between

[930] Trial Judgement, paras 991-994. See also, the Appeals Chamber's findings above with respect to impermissible double-counting (see *supra*, Section XII.B.2.(b)).
[931] Trial Judgement, paras 994, 999 and 1000.
[932] *Strugar* Appeal Judgement, para. 348, referring to *Kvočka et al.* Appeal Judgement, para. 681.
[933] *Strugar* Appeal Judgement, para. 348, referring to *Jelisić* Appeal Judgement, para. 96; *D. Nikolić* Judgement on Sentencing Appeal, para. 16.
[934] *Strugar* Appeal Judgement, para. 348: "a number of elements, relating, *inter alia*, to the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances, dictate different results in different cases such that it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another". See also, *e.g., Blagojević and Jokić* Appeal Judgement, para. 333; *Stakić* Appeal Judgement, para. 381; *Kvočka et al.* Appeal Judgement, para. 681; *Čelebići* Appeal Judgement, para. 721; *Nahimana et al.* Appeal Judgement, para. 1046.

cases are often more significant than similarities and different mitigating and aggravating circumstances might dictate different results.[935]

327. In this case, the Trial Chamber expressly referred to the sentence of life imprisonment imposed on Galić by the Appeals Chamber but rightly decided not to construe the Appeals Chamber's decision as restricting the exercise of its own sentencing discretion in this case.[936] The primary concern is the Trial Chambers' obligation to tailor a penalty to fit the individual circumstances of an accused and the gravity of the crime with due regard for the entirety of the case, which may justify different sentencing in similar cases. Notwithstanding this principle, it remains that a disparity out of reasonable proportion between an impugned sentence and another sentence rendered in a like case may give rise to an inference that the Trial Chamber failed to exercise its discretion properly in applying the law on sentencing.[937]

328. As indicated by the Prosecution, the two cases are indeed similar: both accused were convicted for similar crimes committed in the same location in similar circumstances while occupying the same function. Milošević's crimes were characterised by a similar brutality and cruelty to those of Galić. His participation in the crimes was as central and nearly as prolonged as that of Galić. Like Galić, Milošević also abused his position of authority. Nevertheless, the two cases present certain differences, including Milošević's regular use of the modified air bomb, which was considered by the Trial Chamber in aggravation.[938] At the same time, Milošević's personal circumstances considered by the Trial Chamber in mitigation were also different from those of Galić. Notably, the Trial Chamber considered Milošević's voluntary surrender to the authorities of Serbia and Montenegro before being transferred to the Tribunal, the negotiation and signing of the Anti-sniping Agreement, orders issued by Milošević not to shoot civilians and to abide by the Geneva conventions, *etc.*[939] The Appeals Chamber recalls that the only mitigating factor for which Galić was credited by the Trial Chamber was his "exemplary behaviour [...] throughout the proceedings".[940]

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[935] See*, e.g., Limaj et al.* Appeal Judgement, para. 135, citing *D. Nikolić* Judgement on Sentencing Appeal, para. 19.
[936] Trial Judgement, para. 988.
[937] *Martić* Appeal Judgement, para. 330.
[938] Trial Judgement, para. 1001.
[939] Trial Judgement, para. 1003.
[940] *Galić* Trial Judgement, para. 766. See also *Galić* Appeal Judgement, para. 453.

329. The Appeals Chamber will not speculate on how much weight was given to each of these factors by the Trial Chamber.[941] In its opinion, the differences between the cases suffice to justify the Trial Chamber's decision not to transpose the sentence pronounced against Galić *mutatis mutandis* to Milošević. The sentence of 33 years imprisonment imposed on Milošević remains very serious, and given the specific circumstances of the present case, is not out of reasonable proportion with the sentence imposed on Galić. While another reasonable trier of fact might have imposed a higher sentence on Milošević, the Appeals Chamber does not consider that the sentence pronounced against Milošević was unreasonable or plainly unjust so as to require the Appeals Chamber's intervention.

330. The Appeals Chamber concludes that the Prosecution failed to show that the sentence handed down by the Trial Chamber does not reflect the gravity of the crimes or Milošević's role in their commission.

3. Conclusion

331. For the foregoing reasons, the Appeals Chamber finds that the Prosecution failed to demonstrate that the Trial Chamber committed a discernible error in the exercise of its sentencing discretion.

[941] The Prosecution argues that the Trial Chamber must have given only very limited weight to Milošević's voluntary surrender given that he delayed his surrender for over three years: Prosecution Appeal Brief, para. 42, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Defence Motion for Provisional Release, 13 July 2005.

D. Impact of the Appeals Chamber's findings

332. The Appeals Chamber will now consider whether an adjustment of Milošević's sentence is appropriate in light of its findings made throughout the present Judgement.[942]

1. Mode of liability

333. The Appeals Chamber recalls that it overturned Milošević's convictions for planning the crimes of terror, murder and inhumane acts on the basis that his responsibility for ordering the relevant crimes pursuant to Article 7(1) of the Statute fully encompasses his criminal conduct and does not warrant a separate conviction for planning the same crimes.[943] In this context, where the findings with respect to Milošević's criminal conduct and the seriousness of the crimes remain undisturbed, the Appeals Chamber finds that no reduction of sentence is warranted.

334. In addition, the Appeals Chamber has vacated Milošević's convictions under Article 7(1) with respect to crimes committed through sniping incidents and replaced them with convictions pursuant to Article 7(3) of the Statute.[944] The Appeals Chamber acknowledges that in appropriate cases, a conviction under Article 7(3) of the Statute may result in a lesser sentence as compared to that imposed in the context of an Article 7(1) conviction.[945] However, in this particular case, the Appeal Chamber finds that its conclusions with respect to the form of Milošević's responsibility for the crimes at stake do not in any way diminish his active and central role in the commission of the crimes.[946] Indeed, Milošević did more than merely tolerate the crimes as a commander; in maintaining and intensifying the campaign of shelling and sniping the civilian population in Sarajevo throughout the Indictment period, he provided additional encouragement to his subordinates to commit the crimes against civilians. Therefore, no reduction of sentence is warranted on this basis either.

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[942] *Cf. Martić* Appeal Judgement, para. 347.
[943] See *supra*, Section XI.A.2.(b), para. 274.
[944] See *supra*, Section XI.A.2.(d), para. 281.
[945] *Cf. Strugar* Appeal Judgement, paras 353-354.
[946] *Cf. Hadžihasanović and Kubura* Appeal Judgement, para. 320, referring to *Aleksovski* Appeal Judgement, para. 183, where the Appeals Chamber held as follows:

> […] As warden of a prison he took part in violence against the inmates. The Trial Chamber recognised the seriousness of these offences but stated that his participation was relatively limited. In fact, his superior responsibility as a warden seriously aggravated the Appellant's offences. Instead of preventing it, he involved himself in violence against those whom he should have been protecting, and allowed them to be subjected to psychological terror. He also failed to punish those responsible. […] The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.

2. Specific incidents

335. The Appeals Chamber has affirmed the Trial Chamber's factual findings with respect to all sniping incidents imputed to Milošević but reversed his conviction for the shelling of the Baščaršija Flea Market on 22 December 1994 on the basis that the origin of the shell has not been proved beyond reasonable doubt.[947] It has further vacated Milošević's convictions for the shelling of the BITAS building on 22 August 1995 and that of the Markale Market on 28 August 1995, which occurred during the period of his absence from Sarajevo for medical reasons whilst Sladoje was in charge of the SRK troops.[948] Although these findings do not change the fact that the entire population of Sarajevo was the victim of the crime of terror committed under Milošević's command, they do involve fewer victims of the crimes of murder and other inhumane acts imputable to Milošević under counts 5 and 6 of the Indictment. The Appeals Chamber thus finds that these reversals have an impact, although limited, on Milošević's overall culpability.

3. Double-counting

336. Finally, with respect to the sentencing considerations of the Trial Chamber, the Appeals Chamber recalls its finding that on several occasions the Trial Chamber erroneously took into account the same facts when assessing both the gravity of the crimes and the aggravating circumstances.[949] However, the Appeals Chamber finds that the said factors are relevant for determining Milošević's sentence, and even when properly taken into account only once, still warrant a sentence comparable to that imposed by the Trial Chamber. Therefore, no reduction is warranted on this basis.

4. Conclusion

337. Taking into account the particular circumstances of this case, the gravity of the crimes for which Milošević's convictions have been upheld, and the quashing of the convictions outlined above, the Appeals Chamber concludes that Milošević's sentence should be reduced to a term of imprisonment of 29 years.

[947] See *supra*, Section IX.B.3, para. 232.
[948] See *supra*, Section XI.B.2, para. 293.
[949] See *supra*, Section XII.B.2.(b).

338. As per the discussion in relevant sections of the present Judgement, other Appeals Chamber's findings correcting or refining the Trial Chamber's conclusions are without impact on the verdict.[950]

[950] See *supra*, paras 22, 23, 33, 39, 55, 87, 301.

XIII. DISPOSITION

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

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 21 July 2009;

SITTING in open session;

ALLOWS IN PART Milošević's fourth ground of appeal, in so far as it concerns the crimes committed during his absence from Sarajevo, and **SETS ASIDE** the finding that Milošević was responsible for planning and ordering the shelling of the BITAS building on 22 August 1995, and of the Markale Market on 28 August 1995 (counts 1, in part; 5, in part; and 6, in part);

ALLOWS IN PART Milošević's eighth ground of appeal, and **SETS ASIDE** the finding that Milošević was responsible for the planning and ordering the shelling of the Baščaršija Flea Market on 22 December 1994 (counts 1, in part; 5, in part; and 6, in part);

ALLOWS IN PART Milošević's twelfth ground of appeal, **SETS ASIDE** Milošević's convictions for planning and ordering the crimes under count 1, in the part concerning the sniping of civilian population, and under counts 2 and 3, and **FINDS** Milošević responsible for those crimes under Article 7(3) of the Statute;

SETS ASIDE Milošević's convictions for planning the crimes under count 1, in the part concerning the shelling of the civilian population, and under counts 5 and 6;

DISMISSES Milošević's Appeal in all other respects;

AFFIRMS the remainder of Milošević's convictions under counts 1, Judge Liu Daqun dissenting, 5 and 6;

DISMISSES the Prosecution's Appeal;

REDUCES Milošević's sentence to 29 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules;

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

Done in English and French, the English text being authoritative.

Judge Fausto Pocar, Presiding	Judge Mehmet Güney	Judge Liu Daqun

Judge Andrésia Vaz	Judge Theodor Meron

Judge Liu Daqun appends a partly dissenting opinion.

Dated this 12th day of November 2009,

At The Hague, The Netherlands

[Seal of the Tribunal]

XIV. PARTLY DISSENTING OPINION OF JUDGE LIU DAQUN

A. The "crime of terror"

1. I respectfully disagree with the majority of the bench in affirming Milošević's conviction under Count 1 for the "crime of terror".[1] In my view, there is no basis to find that this prohibition was criminalised beyond any doubt under customary international law at the time relevant to the Indictment.[2] Rather, I would have adopted the approach proposed by Judge Schomburg in his Separate and Partially Dissenting Opinion in the *Galić* Appeal Judgement, overturning Milošević's conviction under Count 1 and convicting him under Counts 4 and 7 for unlawful attacks against civilians, taking into account the terrorisation of the civilian population as an aggravating factor.

1. Jurisdiction

2. It is settled jurisprudence that the Tribunal has jurisdiction to prosecute violations of international humanitarian law under Article 3 of the Statute where four conditions are met:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met […];
>
> (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. […];
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[3]

3. The principle of *nullum crimen sine lege* requires the Tribunal to apply rules of international humanitarian law which are beyond any doubt part of conventional or customary international law at the time relevant to the commission of the alleged offence.[4]

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[1] The majority upholds the findings of the majority in the *Galić* Appeal Judgement, namely that the crime of terror existed under customary international law. Judgement, para. 30. See also Trial Judgement, para. 874.

[2] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 34: "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law […]." (Emphasis in original.)

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

4. The *prohibition* of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is part of customary international law, in accordance with Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. However, this prohibition has not been criminalised by any treaty or convention.[5]

5. It is insufficient for criminalisation to be inferred from the seriousness of the offence but must be established independently.[6] As noted by Justice Robertson: "it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stridently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime."[7] Consequently, criminalisation must be ascertained from the body of customary international law in order to satisfy the fourth *Tadić* condition.

2. State practice

6. It is generally accepted that customary international law may be inferred from state practice and *opinio juris*.[8] To establish a rule of customary international law, state practice has to be virtually uniform, extensive and representative.[9]

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[4] Report of the Secretary-General, para. 34. According to Cassese, "the principle of non-retroactivity of criminal rules is *now* solidly embedded in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime." (Emphasis in original.) A. Cassese, *International Criminal Law*, (Oxford, 2003), at p. 149. See also International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 16 December 1966, Article 15(1).

[5] I note that the "crime of terror" is not included in the list of grave breaches in Article 85 of Additional Protocol I.

[6] See G. Abi-Saab, 'The Concept of War Crimes' in S. Yee and W. Tieya (eds.), *International Law and the Post-Cold War World: Essays in Memory of Li Haopei*, (London, 2001), at p. 112.

[7] *Prosecutor v. Sam Hinga Norman,* Special Court of Sierra Leone, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ("*Child Recruitment Case*"), Dissenting Opinion of Justice Robertson, 31 May 2004 ("Dissenting Opinion of Justice Robertson"), para. 12.

[8] See *Galić* Appeal Judgement, para. 92: "Individual criminal responsibility under the fourth *Tadić* condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals." See also *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, International Court of Justice, Judgement, I.C.J. Reports 1969, ("*North Sea Continental Shelf Cases*"), paras 74, 77: "State practice […] should have been both extensive and virtually uniform in the sense of the provision invoked […] Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law

7. In his Separate and Partially Dissenting Opinion to the *Galić* Appeal Judgement, Judge Schomburg convincingly demonstrated that only "an extraordinarily limited number of states […] had penalized the terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols".[10] These states included: Côte D'Ivoire,[11] the former Czechoslovakia,[12] Ethiopia,[13] The Netherlands,[14] Norway[15] and Switzerland.[16]

8. It is highly doubtful, in my view, that this can be construed as evidence of "extensive and virtually uniform"[17] state practice, particularly since a number of countries including the United States,[18] the United Kingdom,[19] Australia,[20] Germany,[21] Italy[22] and Belgium[23] chose not to include

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requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*"

[9] ICRC, *Customary International Humanitarian Law*, Vol. 1, (Cambridge, 2005), ("Customary Law Study") at p. xxxvi.

[10] *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 10.

[11] Article 138(5) of Côte D'Ivoire's Penal Code refers to "*mesures de terreur*".

[12] The relevant provisions of the Czech and Slovak Criminal Codes derive from the Czechoslovak Criminal Code of 1961, as amended in 1990, in which Article 263a(1) referred to "terroriz[ing] defenceless civilians with violence or the threat of violence."

[13] Article 282(g) of Ethiopia's Penal Code refers to "measures of intimidation or terror."

[14] Article 8(1), (3) and (5) of the Wartime Offences Act of The Netherlands of 1952, as amended in 1990, merely indicates that an increased sentence may be imposed if "the act [constituting the violation of the laws and customs of war] is the expression of a policy of systematic terror." Although the relevant provision applied during the Indictment period, it is of note that it was repealed in 2003.

[15] The Norwegian Military Penal Code refers generally to the Additional Protocols which may raise the question of *nullum crimen sine lege certa*. Section 108(b) of the Military Penal Code of 1902, as amended in 1981, states: "Anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in […] the two Additional Protocols to [the Geneva] Conventions of 10 June 1977, is liable to imprisonment for up to four years".

[16] The Swiss Military Penal Code also refers generally to the Additional Protocols which may similarly raise the question of *nullum crimen sine lege certa* (see *supra*, fn. 15). Article 109 of the Military Penal Code of 1927, as amended in 1968, reads: "Whoever acts contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property, who violates recognised laws and customs of war, will be […] punished."

[17] *North Sea Continental Shelf Cases*, para. 74.

[18] U.S. Code, Title 18, Chapter 118, Section 2441(c)(1) defines a war crime as "a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party". The United States has not ratified either Additional Protocol I or II.

[19] Section 1 of the Geneva Conventions Act 1957, as amended in 1995, punishes grave breaches of Additional Protocol I, with specific reference to Article 85 of the Additional Protocol which makes no mention of the "crime of terror".

law to this effect in legislation penalising attacks against civilians.[24] Moreover, none of the permanent members of the Security Council have penalised the crime of terror against the civilian population.[25]

9. Ultimately, "the continuing trend of nations criminalising terror as a method of warfare"[26] identified by the majority in the *Galić* Appeal Judgement, if it indeed amounts to a trend, postdates the period of Milošević's criminal conduct and is therefore wholly inapplicable to the current case.

3. *Opinio juris*

10. Although it is not usually necessary to demonstrate separately the existence of an *opinio juris* when there is sufficiently dense state practice, in cases of ambiguous practice, a clear *opinio juris* is decisive in assessing the probative value of the practice that is found.[27] In my view, there is

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[20] The War Crimes Act of 1945, amended in 1989, no longer contains the phrase "systematic terrorism".

[21] The German Code of Crimes Against International Law of 2002 does not include the crime of terror. There is no provision under the German Penal Code penalising the terrorisation of the civilian population.

[22] Book III, Title IV, Section 2, Article 185 of the Criminal Military Code of War makes no mention of the crime of terror.

[23] Article 1*ter* (11) of the Law of 16 June 1993 penalises: "*le fait de soumettre à une attaque délibérée la population civile ou des personnes civiles qui ne prennent pas directement part aux hostilités*". It does not mention the "crime of terror." The law was repealed in 2003; however, the new provision contained in Article 136 *quarter* (1)(20) of the Belgian Penal Code reads the same.

[24] While I note that the concept of negative practice has not been fully explored in the context of criminal law, I would suggest that the absence of domestic criminalisation creates a presumption that the international crime does not exist.

[25] I also note the conviction by the Split County Court in Croatia for acts designed "to create the atmosphere of fear" among civilians between March 1991 and January 1993. However, this single, isolated, judgement does not alter my view that there is insufficient state practice to establish customary criminalisation during the Indictment period. Furthermore, Croatian law has not formally penalised the prohibition. See *Prosecutor v. R. Radulović et al.*, Split County Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997. See also Article 158(1), Croatian Criminal Code of 1997.

[26] *Galić* Appeal Judgement, fn. 297.

[27] Customary Law Study, at p. xl: "When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris. Opinio juris* plays an important role, however, in certain situations where the practice is ambiguous, in order to decide whether or not that practice counts towards the formation of custom." See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgement, I.C.J. Reports 1986, para. 186: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules […]."

little evidence of relevant *opinio juris* on the crime of terror at the time relevant to the Indictment. While many states endorsed the prohibition of "acts and threats of violence the primary purpose of which is to spread terror", such support did not extend to its penalisation.[28]

11. There is scant historical support for the existence of the crime of terror in international custom.[29] Although the 1919 Commission on Responsibilities contemplates "a system of terrorism" as part of its list of recommended war crimes,[30] it is uncertain whether this concept corresponds to the prohibition of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" in accordance with Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.[31] Also, the very fact that the crime of terror was not subsequently included in the Nuremburg or Tokyo Charters is further indicative of its non-existence in customary international law.[32]

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[28] In my view, the threshold for criminalisation should not be set too low. As Justice Robertson has noted: "In order to become a criminal prohibition, enforceable in that sphere of international law which is served by international criminal courts, […] it must be clear that the overwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law "norm" intended – or now intend – this rule to have penal consequences for individuals brought before international courts". See *Child Recruitment Case*, Dissenting Opinion of Justice Robertson, para. 20.

[29] It is notable that the U.S. Law of Naval Warfare of 1955 defines war crimes as "acts which violate the rules established by customary and conventional international law regulating the conduct of warfare." (Law of Naval Warfare 1955, NWIP 10-2, Section 320(a)) The list of examples of War Crimes includes "aerial bombardment whose sole purpose is to attack and terrorize the civilian population." (Law of Naval Warfare 1955, NWIP 10-2, Section 320(b)(6)) The same formulation is employed in subsequent editions, which merely omit the "aerial" qualification (Commander's Handbook on the Law of Naval Operations, 1995, NWP 1-14M, Section 6.2.5(6); Commander's Handbook on the Law of Naval Operations, 2007, NWP 1-14M, Section 6.2.6(6)). It is striking in this context that the U.S. has nonetheless not criminalised the terrorisation of civilians in its Uniform Code of Military Justice or the War Crimes Act of 1996. Consequently, although the Naval Handbook acknowledges the need to make terrorisation a war crime, it does so without constituting actual practice or *opinio juris* of criminalisation. I also note that the definition of war crimes now includes the *caveat* requiring such crimes to be "generally recognized as war crimes."

[30] On the Commission on Responsibilities, see U.N. War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, (London, 1948), Chapter III, at pp. 33-35 (reproducing the 1919 Commission's list of war crimes).

[31] I consider the crime of terrorism to be distinct from the crime of terror. The former, in my view, requires a political, religious or ideological motivation. See *infra*, paras 27-28.

[32] Nuremberg Charter: Charter of the International Military Tribunal Annexed to the London Agreement (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis), 8 August 1945, 82 U.N.T.S. 280; Tokyo Charter: Special Proclamation by the Supreme Commander for the Allied Powers, 19 January 1946, T.I.A.S. No. 1589, 4 Bevans 20. I also note that the terrorisation of civilians was similarly not penalised under Control Council Law No. 10. See Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, Official Gazette Control Council for Germany, No. 3, 31 January 1946.

12. In fact, neither the Rome Statute of the International Criminal Court[33] nor the Customary International Humanitarian Law Study recognises the crime of terror as a war crime. In my view, this militates against the finding that the crime of terror was criminalised under customary international law during the Indictment period.

4. Conclusion

13. Between August 1994 and November 1995, there was a clear prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population under customary international law. However, this prohibition did not entail individual criminal responsibility and, consequently, this Tribunal has no jurisdiction over the crime of terror during the Indictment period. In my view, Milošević's conviction for the crime of terror, should be vacated and replaced with that of unlawful attacks against civilians. His primary purpose to spread terror among the civilian population may be considered as an aggravating factor in his sentencing.

B. The elements of terror

14. While I am not persuaded that the crime of terror existed under customary international law between August 1994 and November 1995, I consider that the elements of the offence set out by the majority in the Judgement do not adequately define a criminal charge.[34] In my view, this problem stems from the simple conversion of the prohibition, as proscribed by the Additional Protocols, into an international crime.

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[33] While I am aware of Article 10 of the Rome Statute, I believe that states would have included the crime of terror as a war crime under Article 8 of the Rome Statute if they had indeed believed that this crime existed under customary international law beyond doubt.

[34] The majority reiterates the formulation of the crime of terror adopted by the Trial Judgement which consists of:

> 1. Acts or threats 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.

See Judgement, para. 31, citing the Trial Judgement, para. 875. This represents a development of the formula set out in the *Galić* Appeal Judgement, para. 100.

1. *Actus reus*

15. In accordance with the prohibition, the *actus reus* of the crime of terror is the commission of "acts or threats of violence". The *Galić* Appeals Chamber considered that Article 49(1) of Additional Protocol I defined "attacks" as "acts of violence", and concluded that the crime of terror "can comprise attacks or threats of attacks against the civilian population." It emphasised that:

> 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 thereof. The nature of the acts or threats of violence directed against the civilian population can vary; the primary concern […] 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 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.[35]

16. This definition of the crime of terror is revisited in the present Judgement. Finding that "actual infliction of death or serious harm to body or health is [not] a required element of the crime of terror", the majority considers "[c]ausing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*."[36] As a result, "the nature of the acts of violence or threats thereof constitutive of the crime of terror can vary […]."[37]

17. Focusing on elements which are *not* part of the *actus reus*, the majority fails to specify the constitutive elements of the crime. According to this definition, the *actus reus* of the crime of terror may be established wherever the civilian population is attacked or threatened with an attack. The offence would thus appear to lack a clear minimum threshold, particularly where threats constitute the *actus reus* of the offence in the absence of any result requirement of actual terrorisation.[38] In my view, this violates the principle of specificity.[39]

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[35] *Galić* Appeal Judgement, para. 102. (Internal citations omitted.)
[36] Judgement, para. 33.
[37] *Ibid*.
[38] *Id.*, para. 35.
[39] See *Vasiljević* Trial Judgement, paras 201-202: "Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible." (Emphasis in original.)

2. *Mens rea*

18. The majority confirms that "the *mens rea* of the crime of terror consists of the intent to make the civilian population […] the object of the acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population."[40] However, in accordance with the prohibition, to satisfy the *mens rea*, spreading terror must also be the *primary* purpose of the acts or threats of violence, although it need not be the only one.[41]

19. This primary purpose requirement is entirely novel to the crime of terror. All other specific intent crimes merely require that the requisite *mens rea* be established: there is no hierarchy of intent. Indeed, to my knowledge, prior to the *Galić* case, the ranking of intent had no place in international criminal law. In my view, this is an arbitrary requirement and, furthermore, it is one that is impossible to determine with any certainty from purely circumstantial factors in accordance with the approach adopted by the majority.[42]

3. Lack of result requirement

20. The actual terrorisation of the civilian population is not currently an element of the crime of terror.[43] According to the majority, it is sufficient that "the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include, but are not limited to death or serious injury to body or health."[44] Thus, the crime of terror has no result requirement *per se*. In my view, this lack of a result requirement is not easily reconciled with the third *Tadić* condition.[45]

21. In the present case, the majority considers that "because the Trial Chamber established […] that all the incidents imputed to the SRK constituted unlawful attacks against civilians, and thus caused death or serious injury to body or health of civilians, the threshold of gravity required for the crime of terror based on those incidents has been met."[46] In these circumstances, the victims of the crime of terror are not necessarily those terrorised by the acts or threats of violence, but those injured by the acts of violence themselves.

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[40] Judgement, para. 37, citing *Galić* Appeal Judgement, para. 104.
[41] *Ibid.*
[42] Judgement, paras 37-38.
[43] *Id.,* para. 35. See also *Galić* Appeal Judgement, para. 104.
[44] Judgement, para. 33. (Internal citations omitted.)
[45] See *supra*, para. 2.
[46] Judgement, para. 33. (Internal citations omitted.)

22. The crime of terror ostensibly creates two sets of victims, namely, the direct victims of the attack and those who are terrorised as a result of the attack. However, according to the majority, the victims of the crime of terror may be the direct victims of the attacks themselves, rather than the actual targets of terrorisation. Indeed, actual terrorisation is not required for the offence to be made out, only the requisite *mens rea* to spread terror. As a result, the current definition of the crime of terror lacks coherence, since theoretically the victims of the direct attack may in fact be deceased. While I recognise that in some circumstances those injured by an unlawful attack may also be terrorised, I believe that in the absence of actual terrorisation there are no victims of terror *stricto sensu*. In my view, this incongruity undermines the very purpose of a prohibition on terror.

C. A new approach to the crime of terror

23. It is debateable whether, since 1995, there has been a continuing trend of states criminalising terror as a method of warfare in accordance with the Additional Protocols.[47] There is, however, a discernable gap in international criminal law in its failure to punish those responsible for inflicting severe psychological scars on individuals in the course of conflict[48] and, in certain instances, in times of peace.[49]

24. While the prohibition on terror translates uneasily into a crime, in my view, a "crime of terror" should be properly defined and prospectively confirmed as part of the canon of war crimes either by convention or clear custom. The offence would criminalise unlawful acts or threats designed to create an atmosphere of terror among a civilian population that result in terrorisation. Such conditions could include, *inter alia*, acts of beating, torture, rape and murder as well as threats and intimidation; shelling and sniping in and around civilian areas; separation of family members; burning of homes and destruction of property.

25. Accordingly, I would suggest that a war crime of terror comprise the following elements:

1. The commission of any unlawful act or threat; [50]

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[47] See *Galić* Appeal Judgement, para. 95, fns 297-300. See also the Separate and Partially Dissenting Opinion of Judge Schomburg, para. 21.

[48] History is replete with such examples. Consider the "Sack of Magdeburg" 1631; the "Reign of Terror" in France between 1793-1794; the "Rape of Nanking" 1937-1938.

[49] Similarly, consider Uganda under Idi Amin 1971-1979; "Operation Condor" in Argentina, Bolivia, Chile, Paraguay, and Uruguay 1975-1983.

[50] The "unlawful act" requirement would comprehend all unlawful acts amounting to violations of the laws or customs of war.

> 2. The offender had the specific intent to spread terror among the civilian population or individual civilians; and
>
> 3. The unlawful act or threat resulted in serious trauma or psychological harm.[51]

26. In my view, such a crime should also be considered an offence in the context of peace, as a crime against humanity.[52] As such, the *chapeau* requirement would apply. The crime would therefore be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[53] This offence would include, *inter alia*, state terror and terrorisation by guerrilla groups.[54]

27. Although acts of terrorism would fall within the compass of the offence of terror, the crime of terror and terrorism are not entirely congruent. This is clear when the two offences are compared. Although there is no universally accepted definition of terrorism *per se*, there are elements of definition which are generally accepted.[55] According to Antonio Cassese:

> […] broadly speaking, terrorism consists of (i) acts normally criminalized under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization

[51] In my view the result requirement should relate to psychological rather than physical harm. I recognise that neither "serious trauma" nor "psychological harm" represents a medical condition *stricto sensu.* However, I would suggest that the scope of these conditions be determined with reference to the International Statistical Classification of Diseases and Related Health Problems, World Health Organisation, 10th Revision, 2007. See in particular Chapter V, F43 and F44. These sections should not be considered limitative as to the kind of harm inflicted by the crime of terror. Rather, the harm should be determined on a case-by-case basis and should be considered in light of most recent developments in psychological disorders.

[52] Similar to other acts that can constitute the *actus reus* of a crime against humanity (i.e. murder, inhumane acts, etc.), acts of terror are not necessarily serious enough to constitute an *international* crime *per se*. Isolated acts of terror may constitute grave infringements of human rights or, as outlined above, war crimes, but fall short of meriting the stigma attaching to an international crime. For this reason I believe it is more appropriate to consider the crime of terror as a crime against humanity or a war crime rather than a distinct and independent crime.

[53] This *chapeau* requirement is cited with reference to the Rome Statute of the International Criminal Court, adopted 17 July 1998 and entered into force on 1 July 2002, Article 7(1).

[54] As a crime against humanity, the "unlawful act" of the crime of terror would consist of any serious violation of a fundamental right contrary to international law.

[55] Reaching an agreement on a general definition has been notoriously difficult. Indeed, the failure to agree on a definition was a factor which prevented the inclusion of terrorism in the Rome Statute of the ICC. See A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary,* (Oxford, 2002), at p. 517.

to take some sort of action, and finally (iii) are politically or ideologically motivated, i.e. are not based on the pursuit of private ends.[56]

28. While the *actus reus* of the crime of terror and crime of terrorism appear virtually identical, the context requirement effectively sets the two offences apart.[57] Furthermore, the *mens rea* of terror and terrorism are distinct. Crucially, the intent to spread terror among the civilian population is only a possible *mens rea* requirement for terrorism,[58] while it is a fundamental element of the crime of terror.

29. Although these proposals for a crime of terror are purely academic, the lessons of history suggest that the inclusion of such an offence under international criminal law is long overdue.[59] In my view, the time has come for the prohibition on terror to graduate into a coherent and comprehensive crime that protects the mental health of individuals in peace as well as in war by punishing those individuals responsible for intentionally and unlawfully inflicting psychological harm.

D. Ordering: double counting elements the crime

30. I respectfully disagree with the majority in considering Milošević's abuse of his position of authority as an aggravating factor in the context of ordering. The *actus reus* of ordering necessarily

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[56] A. Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law,* Journal of International Criminal Justice 4 (2006), at p. 937. Cassese based his conclusions on, *inter alia,* the following provisions: Article 1(2) of the Arab Convention for the Suppression of Terrorism, 22 April 1998; Article 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999; Article 1(3) of the O.A.U. Convention on the Prevention and Combating of Terrorism, 14 July 1999; Article 2(1)(b) of the 1999 U.N. Convention for the Suppression of the Financing of Terrorism; U.N. General Assembly Resolutions (para. 3 of the Declaration on Measures to Eliminate International Terrorism, annexed to Res. 49/60 adopted on 9 December 1994; para. 2 of the subsequent resolutions 50/53 (11 December 1995), 51/210 (17 December 1996), 52/165 (15 December 1997), 53/108 (8 December 1998), 54/110 (9 December 1999), 55/158 (12 December 2000), 56/88 (12 December 2001), 57/27 (19 November 2002), 58/81 (9 December 2003), 59/46 (2 December 2004)); Article 83.01(1) of the Canadian Criminal Code.

[57] My proposed definition of a crime of terror is limited in scope to armed conflicts (internal and international) and widespread or systematic attacks against the civilian population.

[58] A. Cassese, *supra*, fn. 56, at pp. 938-940. Consider also T. Weigend, *The Universal Terrorist – The International Community Grappling with a Definition,* Journal of International Criminal Justice 4 (2006), at p. 923. According to Weigend, "[t]errorists typically pursue a triple goal: they have 'normal' intent to commit the base crime of murder, bombing, assault, *etc*.; they intend, further, to intimidate a group or the population as a whole and/or to compel others to take action (*e.g.* to release political prisoners); and they have ulterior political or ideological motives, *e.g*. to destabilize the present government or to defeat a rival religion or ideology."

[59] Despite the need for such a crime, I cannot agree that the offence has been criminalised under customary international law. See *supra*, paras 1-13.

requires a person in a position of authority to instruct another person to commit a crime.[60] It follows therefore, that the abuse of a position of authority is inherent to the mode of liability of ordering.

31. Considering that Milošević was *de jure* commander of the SRK during the Indictment period, any order issued by him in breach of the principles of international humanitarian law necessarily entailed an abuse of his position of authority. On this basis, I disagree with the approach adopted by the majority in taking into account Milošević's position as a commander when assessing the aggravating circumstances for ordering.

E. Sentencing

32. While I disagree with the majority for affirming Milošević's conviction for the crime of terror under Count 1 of the Indictment, I am in agreement with the sentence imposed. In my view Milošević should have been convicted under Counts 4 and 7 of the Indictment for the same underlying conduct and the terrorisation of the civilian population should have been taken into account as an aggravating factor. In adopting this approach, the same sentence would have been reached as that determined by the majority.

33. Furthermore, while I also disagree with the majority's approach in considering Milošević's abuse of position of authority as an aggravating factor in the context of ordering, I am in agreement with the verdict and the sentence which, in my view, reflect the culpability of Milošević for the crimes he committed between August 1994 and November 1995.

Done in English and French, the English text being authoritative.

Judge Liu Daqun

[60] *Kordić and Čerkez* Appeal Judgement, para. 28.

Dated this 12th day of November 2009,
At The Hague, The Netherlands.

[Seal of the International Tribunal]

XV. ANNEX A – PROCEDURAL HISTORY

A. Trial proceedings

1. The original indictment was brought against Milošević and Galić.[1] On 26 March 1999, the Prosecution filed a revised indictment, which listed Milošević as the sole accused.[2] Milošević voluntarily surrendered to the authorities of Serbia and Montenegro and was transferred to the United Nations Detention Unit on 3 December 2004.[3] At his initial appearance on 7 December 2007, Milošević pleaded not guilty to all counts.[4] The Prosecution filed the amended and operative Indictment on 18 December 2006,[5] following the decision of the Trial Chamber on a requested amendment of the Indictment and on the application of Rule 73*bis* (D) of the Rules.[6]

2. The trial proceedings against Milošević began on 11 January 2007[7] before a bench of Trial Chamber III, composed of Judge Patrick Robinson, presiding, Judge Antoine Kesia-Mbe Mindua, and Judge Frederik Harhoff. The Prosecution called a total of 84 witnesses, and the Defence called 53 witnesses.[8] Two persons appeared as witnesses called by the Trial Chamber pursuant to Rule 98 of the Rules.[9] The Trial Chamber admitted into evidence 935 exhibits tendered by the Prosecution and 522 exhibits tendered by the Defence.[10] In addition, the Trial Chamber admitted into evidence 16 sets of photographs as court exhibits.[11] The Final Trial Briefs were filed on 1 October 2007.[12] Closing arguments were heard on 9 and 10 October 2007.

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[1] *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-I, Indictment, 15 April 1998 (confidential), confirmed by *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-I, Review of the Indictment, 24 April 1998.
[2] *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-I, Indictment, 26 March 1999 (confidential); redacted version filed the same day.
[3] Trial Judgement, para. 3.
[4] Initial Appearance Hearing, 7 Dec 2004, T. 8-11.
[5] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Amended Indictment, 18 December 2006.
[6] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Amended Indictment and Application of Rule 73*bis*(D), 12 December 2006.
[7] Pre-Trial Conference, 10 January 2007, T. 258; Prosecution Opening Statement, 11 January 2007, T. 259.
[8] Trial Judgement, para. 4.
[9] Trial Judgement, para. 4.
[10] Trial Judgement, para. 4.
[11] Trial Judgement, para. 4.
[12] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Closing Brief of the Prosecution, 1 October 2007 (confidential); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Defence

3. The Trial Judgement was rendered on 12 December 2007.[13] The Trial Chamber found Milošević guilty pursuant to Article 7(1) of the following crimes: terror, a violation of the laws or customs of war (count 1); murder, a crime against humanity (counts 2 and 5); and inhumane acts, a crime against humanity (counts 3 and 6).[14] As a consequence of the conviction entered under count 1, the Trial Chamber dismissed the charges under counts 4 and 7 (unlawful attacks against civilians, a violation of the laws or customs of war).[15] The Trial Chamber imposed a single sentence of 33 years of imprisonment.[16]

B. Appeal proceedings

1. Notices of appeal

4. Pursuant to Rule 108 of the Rules and Article 25 of the Statute, the Prosecution filed its Notice of Appeal against the Trial Judgement on 31 December 2007. Milošević filed his Notice of Appeal on 11 January 2008.[17]

2. Composition of the Appeals Chamber

5. On 4 February 2008, Judge Fausto Pocar, at the time President of the Tribunal, designated the following Judges to form the Appeals Chamber's Bench hearing the case: Judge Fausto Pocar (Presiding), Judge Mehmet Güney, Judge Liu Daqun, Judge Andrésia Vaz, and Judge Theodor Meron. He further appointed himself to serve as Pre-Appeal Judge.[18]

3. Appeal briefs

(a) Prosecution's Appeal

6. The Prosecution filed its Appeal Brief on 30 January 2008. On 7 February 2008, Milošević sought to have the dead-line for filing his Defence Respondent Brief and the Defence Appeal Brief

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Final Brief (Rule 86(B)) with Public Annex A, French original filed on 1 October 2007 and the English translation filed on 19 October 2007 (confidential).

[13] The B/C/S translation of the Trial Judgement was served on Milošević on 30 July 2008.

[14] Trial Judgement, para. 1006. See also *supra*, Section I.A, para. 5.

[15] Trial Judgement, paras 981, 1007. See also *supra*, Section I.A, para. 5.

[16] Trial Judgement, para. 1008. See also *supra*, Section I.A, para. 5.

[17] The English translation was filed on 16 January 2008. The public redacted version filed in French on 11 May 2009. The English translation of the public redacted version was filed on 20 October 2009.

[18] Order Appointing the Pre-Appeal Judge, 13 February 2008.

extended, as he had not yet received the translation of the Trial Judgement into B/C/S.[19] The Prosecution agreed that an extension of time was appropriate.[20] The Appeals Chamber granted the request and ordered Milošević "to file his Appeal Brief within 15 days and Respondent's Brief within 7 days of his receipt from the Registrar of the official B/C/S translation of the Trial Judgement".[21]

7. On 6 August 2008, Milošević filed his Defence Response Brief.[22] The Prosecution filed its Reply Brief on 12 August 2008.

(b) Milošević's Appeal

8. On 7 August 2008, Milošević applied for a further extension of time until 13 September 2008 to file his Defence Appeal Brief and requested an increase of 10,000 words to the word limit for his Appeal Brief.[23] Both requests were denied by the Pre-Appeal Judge on 11 August 2008.[24] Consequently and pursuant to the Decision on Extension of Time, Milošević filed his Defence Appeal Brief on 14 August 2008.[25]

9. On 23 September 2008, the Prosecution filed its Response Brief.[26] On 9 October 2008, Milošević filed his Defence Reply Brief.[27]

[19] Defence Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief, French original filed on 7 February 2008; English translation filed on 8 February 2008.
[20] Prosecution Response to Defence Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief, 11 February 2008.
[21] Decision on Defence Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief, 20 February 2008 ("Decision on Extension of Time"), p. 4.
[22] The English translation was filed on 13 August 2008.
[23] Defence Application for Extension of Time to File the Appellant's Brief, 7 August 2008 (English translation filed on 8 August 2008); Request for Authorisation to Exceed the Length of the Appellant's Brief, 7 August 2008 (English translation filed on 12 August 2008).
[24] Decision on Defence Motion for Extension of Time to File Appellate Brief and to Increase the Word Limit, 11 August 2008.
[25] The English translation was filed on 11 September 2008. The public redacted version was filed in French on 11 May 2009. The English translation of the public redacted version was filed on 1 October 2009.
[26] Amended public redacted version was filed on 15 May 2009 (Notice Changing Status of the Public Redacted Version of Prosecution Response Brief Filed on 7 October 2008 and Filing of New Public Redacted Version).
[27] The English translation was filed on 15 October 2008. The public redacted version was filed on 19 March 2009 in French, and its English translation was filed on 15 April 2009.

4. Provisional release

10. On 14 April 2008, Milošević sought to be provisionally released from 3 May until 13 May 2008 in order to attend the wedding of his son and to visit terminally ill brother.[28] The Appeals Chamber denied Milošević's request as there was "no suggestion of an acute crisis or of life-threatening medical condition that constitute[d] a 'special circumstance' warranting provisional release".[29]

5. Decisions under Rule 115 of the Rules

11. On 20 January 2009, the Appeals Chamber denied Milošević's motion seeking to have admitted into evidence the diary of Louis Fortin of the UNPROFOR and to have witnesses Louis Fortin, W-46, Rupert Smith, and W-156 called before the Appeals Chamber for the purposes of cross-examination on the contents of the tendered evidence, inviting Milošević, if he so wished, to file an amended motion in full compliance with Rule 115 of the Rules.[30]

12. Milošević filed his confidential amended motion on 19 February 2009,[31] which the Appeals Chamber dismissed as failing to meet the requirement of specificity under Rule 115 of the Rules.[32]

13. On 8 September 2009,[33] the Appeals Chamber dismissed Milošević's motion seeking the admission into evidence of the Order No. 09/30/18-239 issued by General Ratko Mladić on 8 August 1995 to appoint Čedomir Sladoje as commander of the SRK during the time of Milošević's medical treatment in Belgrade.[34] The Appeals Chamber found the motion to be frivolous, imposed sanctions against Milošević's counsel in the form of non-payment of fees associated therewith pursuant to Rule 73(D) of the Rules, and issued him a warning under Rule 46(A) of the Rules.

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[28] Defence Application for Provisional Release Pursuant to Rule 65(I) with Public Attachment A and Confidential Attachments B, C, and D, 14 April 2008, paras 9, 23-27.
[29] Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008 (public redacted version), para. 7.
[30] Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009 ("Decision of 20 January 2009"), para. 22.
[31] Further Motion to Present Additional Evidence, 19 February 2009 (confidential). The English translation was filed on 26 February 2009.
[32] Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009, paras 19-21.
[33] Decision on Dragomir Milošević's Third Motion to Present Additional Evidence, 8 September 2009.
[34] Motion to Present Additional Evidence with Confidential Annex A, 3 August 2009 (confidential). The English translation filed on 5 August 2009.

6. Other pre-appeal decisions

(a) Access to material in the present case by accused in other cases before the Tribunal

14. On 27 April 2009,[35] the Appeals Chamber granted Momčilo Perišić's request for access to confidential materials in the present case.[36] The "Prosecution's Notification of Compliance with Decision Re Access by Perišić" was filed on 12 May 2009, followed by the "Prosecution's Notice Regarding Rule 70 Material" filed on 9 November 2009 (with confidential annex).

15. On 19 May 2009, the Appeals Chamber granted the "Motion by Radovan Karadžić for Access to Confidential Materials in the Milošević Case" filed on 14 April 2009 by Radovan Karadžić.[37] The "Prosecution's Notification of Compliance with Decision Re Access by Karadžić" was filed on 26 May 2009. On 8 October 2009, the Appeals Chamber denied the "Motion by Radovan Karadžić for Variance of Protective Measures" filed by Karadžić on 26 August 2009, in relation to the Prosecution's witnesses who had testified in the present case.[38]

7. Disclosure

16. The issues related to the Prosecution's disclosure of the diary of Louis Fortin of the United Nations Protection Force completed on 7 April 2008, are addressed in the Appeals Chamber's Decision of 20 January 2009 recalled above.

17. On 18 August 2009, the Trial Chamber seized of the *Prosecutor v. Momčilo Perišić* case[39] granted the Prosecution's motion seeking variation of the Trial Chamber's Decision on Protective Measures of 4 June 2008[40] and allowed the Prosecution to disclose to Milošević the testimonies of two witnesses from the *Perišić* case. Milošević did not file any motion before the Appeals Chamber in this regard.

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[35] Decision on Momčilo Perišić's Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009.
[36] Addendum to Motion by Momčilo Perišić Seeking Access to Confidential Material in the *Dragomir Milošević* Case No. IT-98-29/1-T, 4 March 2009.
[37] Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009.
[38] Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 8 October 2009.
[39] Case No. IT-04-81-T ("*Perišić* Case").
[40] *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Urgent Prosecution Motion Seeking Variation of the Trial Chamber's Decision on Protective Measures of 4 June 2008, 30 July 2009 (confidential).

8. Status Conferences

18. In accordance with Rule 65*bis*(B) of the Rules, Status Conferences were held on 29 April 2008, 22 August 2008, 24 November 2008, 11 March 2009, and 7 July 2009.[41]

9. Appeals Hearing

19. The Scheduling Order for Appeals Hearing was issued on 22 June 2009, followed by the "*Addendum* to the Order Scheduling the Appeals Hearing" issued on 6 July 2009, in which the Appeals Chamber specified the modalities of the hearing and invited the parties to address a number of issues in relation to their written submissions. The Appeals Chamber heard the oral arguments of the parties regarding the Appeals and Milošević's personal statement on 21 July 2009.[42]

[41] A subsequent status conference was due by 4 November 2009. On 20 October 2009, Counsel for Milošević informed the Pre-Appeal Judge that a status conference was not necessary for Milošević prior to the delivery of the Appeal Judgement. The Prosecution was duly notified of the matter. Considering that the primary purpose of a status conference pursuant to Rule 65*bis*(B) of the Rules is to allow the person in custody pending appeal the opportunity to raise issues in relation thereto, no status conference was held at that stage.

[42] AT. 34-168.

XVI. ANNEX B – GLOSSARY

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

M. BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-06-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement").

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

ČELEBIĆI

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Judgement on Sentencing Appeal").

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("*Galić* Trial Judgement").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement").

HADŽIHASANOVIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

M. JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, ("*M. Jokić* Judgement on Sentencing Appeal").

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 as amended by the Corrigendum to Judgement of 17 December 2004, 26 January 2005 ("*Kordić and Čerkez* Appeal Judgement").

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-AR73.2, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling That Judge Canivell is Unable to Continue Sitting in This Case, 15 September 2006.

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, 17 March 2009 ("*Krajišnik* Appeal Judgement").

KRŠTIĆ

Prosecutor v. Radislav Krštić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krštić* Trial Judgement").

Prosecutor v. Radislav Krštić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krštić* Appeal Judgement").

KUNARAC *ET AL.*

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

KUPREŠKIĆ *ET AL.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA *ET AL.*

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LIMAJ *ET AL.*

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 as amended by the Corrigendum to Judgement of 27 September 2007, 16 November 2007 ("*Limaj et al.* Appeal Judgement").

MARTIĆ

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement").

D. MILOSEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Decision on Defence Motion for Provisional Release, 13 July 2005.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-PT, Decision on Amended Indictment and Application of Rule 73*bis*(D), 12 December 2006.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts With Dissenting Opinion of Judge Harhoff, 10 April 2007.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Order Appointing the Pre-Appeal Judge, 13 February 2008.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Defence Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief, 20 February 2008 ("Decision on Extension of Time").

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008 (public redacted version).

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Defence Motion for Extension of Time to File Appellate Brief and to Increase the Word Limit, 11 August 2008.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009 ("Decision of 20 January 2009").

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Further Motion to Present Additional Evidence, 9 April 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Momčilo Perišić's Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Scheduling Order for Appeals Hearing, 22 June 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, *Addendum* to the Order Scheduling the Appeals Hearing, 6 July 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Third Motion to Present Additional Evidence, 8 September 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 8 October 2009.

MRKSIĆ AND ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štella", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal").

M. NIKOLIĆ

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 ("*Momir Nikolić* Judgement on Sentencing Appeal").

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

PRLIĆ *ET AL.*

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009.

B. SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

STRUGAR

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

D. TADIĆ

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

TOLIMIR

Prosecutor v. Zdravko Tolimir et al., Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006.

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Trial Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

2. ICTR

BAGILISHEMA

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 ("*Bagilishema* Appeal Judgement").

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

KAJELIJELI

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, 19 September 2005 ("*Kamuhanda* Appeal Judgement").

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement").

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 ("*Muhimana* Appeal Judgement").

MUSEMA

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

MUVUNYI

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 ("*Muvunyi* Appeal Judgement").

NAHIMANA *ET AL.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement").

NIYITEGEKA

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement").

NTAGERURA *ET AL.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

RUTAGANDA

Georges Anderson Nderubunwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement")

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 ("*Simba* Appeal Judgement").

B. List of designated terms and abbreviations

According to Rule 2(B) of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice versa.

ABiH	Army of the Republic of Bosnia and Herzegovina (*Armija Bosne i Hercegovine*)
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva of 8 June 1977, 1125 U.N.T.S. 609

Agreed facts	*Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Prosecution's Catalogue of Facts Agreed Between the Prosecution and Defence, with Annex A thereto, 28 February 2007
Anti-sniping Agreement	UNPROFOR had initiated negotiations on an anti-sniping agreement in response to civilian casualties that were caused by sniping. This agreement was signed on 14 August 1994.
AT.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to public.
B/C/S	Bosnian / Croatian / Serbian language
BiH	Bosnia and Herzegovina
BiH MUP	Ministry of Interior of Bosnia and Herzegovina
Cf.	Compare with
D	Designated "Defence" for the purpose of identifying exhibits
Defence Appeal Brief	Defence Appeal Brief Including Confidential Annexes A and B and Public Annexes C and D, French original filed on 14 August 2008 (confidential); English translation filed on 11 September 2008; public redacted version filed in French on 11 May 2009; English translation of the public redacted version filed on 1 October 2009.
Defence Final Brief	*Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Defence Final Brief (Rule 86(B)) with Public Annex A, French original filed on 1 October 2007; the English translation filed on 19 October 2007 (confidential)
Defence Notice of Appeal	Defence Notice of Appeal Against the Trial Judgement, French original filed on 11 January 2008 (confidential); the English translation filed on 16 January 2008; the public redacted version filed in French on 11 May 2009
Defence Reply Brief	Brief in Reply Filed by the Defence, French original filed on 9 October 2008 (confidential); English translation filed on 15 October 2008; public redacted version filed on 19 March 2009 in French and the English translation filed on 15 April 2009
Defence Response Brief	Defence Respondent's Brief with Annex 1, French original filed on 6 August 2008; English translation filed on 13 August 2008
Fn(s)	Footnote(s)
Geneva Conventions	Geneva Conventions I to IV
HVO	Croatian Defence Council (*Hrvatsko vijeće obrane*)
ICRC	International Committee of the Red Cross
ICRC Commentary to the Additional Protocols	Claude Pillot, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva/Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987) International Committee of

	the Red Cross of Geneva, 1987
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
Id.	*Idem*
Indictment	*Prosecutor v. Dragomir Milošević*, Case No IT-98-29/1-PT, Amended Indictment, 18 December 2006
JNA	Yugoslav Peoples' Army (*Jugoslovenska Narodna Armija*)
KDZ	BiH Counter Sabotage Protection Department
Milošević's Appeal	Defence Notice of Appeal and Defence Appeal Brief, jointly
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
P	Designates "Prosecution" for the purpose of identifying exhibits
p. (pp.)	Page(s)
para. (paras)	Paragraph(s)
Prosecution's Appeal	Prosecution Notice of Appeal and Prosecution Appeal Brief, jointly
Prosecution Appeal Brief	Prosecution Appeal Brief, 30 January 2008
Prosecution Closing Brief	*Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Closing Brief of the Prosecution, 1 October 2007 (confidential)
Prosecution Notice of Appeal	Prosecution Notice of Appeal, 31 December 2007
Prosecution Reply Brief	Prosecution Reply Brief, 12 August 2008
Prosecution Response Brief	Prosecution Response Brief, 23 September 2008 (confidential); Notice Changing Status of the Public Redacted Version of Prosecution Response Brief Filed on 7 October 2008 and Filing of New Public Redacted Version, 15 May 2009
RTV building	Sarajevo Radio and Television building
Rules	Rules of Procedure and Evidence of the Tribunal
SRK	Sarajevo-Romanija Corps of the VRS (*Sarajevo-Romanija Korpus*)
Statute	Statute of the Tribunal
T.	Transcript page from hearings at trial in the instant case
Third Geneva Convention	Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135.
TNT	Trinitrotoluene
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in

	the Territory of the Former Yugoslavia since 1991.
Trial Judgement	*Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Judgement, 12 December 2007.
UMC	University Medical Centre in Sarajevo
UNMO	United Nations Military Observer
UNPROFOR	United Nations Protection Force
VRS	Army of the Republika Srpska (*Vojska Srpske Republike Bosne i Herzegovine*, later *Vojska Republike Srpske*)