

**INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-98-29/1-A

Before the Appeals Chamber

**Judge Fausto Pocar, presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron**

Registrar:

Mr Hans HOLTHUIS

Date:

14 August 2008

THE PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

DEFENCE APPEAL BRIEF

The Office of the Prosecutor

Mr Paul Rogers

Counsel for the Accused

**Mr Branislav Tapušković
Ms Branislava Isailović**

INTRODUCTION

1. Trial Chamber III of the ICTY rendered the Judgement in the case of *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1, on 12 December 2007.
2. The Prosecution filed its Notice of Appeal on 31 December 2007 and its Appeal Brief on 30 January 2008.
3. Dragomir Milošević filed his Notice of Appeal on 11 January 2008 and his Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief on 7 February 2008.
4. The Appeals Chamber rendered its Decision on Defence Request to Extend the Deadline to File the Appellant's Brief and the Respondent's Brief on 20 February 2008.
5. The Registry submitted the BCS translation of the Judgement on 30 July 2008.

PART I

ERRORS OF LAW

1ST GROUND OF APPEAL

The Chamber violated the legal norms governing the crime of terror and crimes against humanity, specifically murder and inhumane acts, as well as the principle of the presumption of innocence, by failing to establish beyond a reasonable doubt the Appellant's guilt for the said crimes.¹

Introduction

6. The Trial Chamber ("the Chamber") found the Appellant guilty of the crime of terror, punishable by Article 3 of the ICTY Statute ("Statute"), and of crimes against humanity, punishable by Article 5 of the Statute.

The Chamber sets out its findings concerning the following:

¹ Paragraphs 5 and 6 of the Notice of Appeal filed by the Defence.

- a. the crime of terror, in Part III of the Judgement under appeal (“Judgement”), sub-section A, points 1, 2, 3, and 6;
 - b. crimes against humanity, in Part III of the Judgement, sub-section A, points 4 and 5.
7. With regard to the crime of terror, the Chamber first sets out the general requirements for the application of Article 3 of the ICTY Statute,² then the constituent elements of the crime of terror³ and, finally (after evaluating the evidence in the trial record⁴ and setting out the constituent elements of the crimes of murder and inhumane acts⁵), the constituent elements of the crime of attacks on civilians.⁶
 8. With regard to crimes against humanity, the Chamber, in a rather muddled fashion, enumerates the *chapeau* norms under Article 5 of the Statute and the constituent elements of the underlying crimes, namely murder and inhumane acts.⁷
 9. As the Chamber correctly notes,⁸ the Appellant never disputed the existence of an armed conflict to which the acts of violence charged in the indictment related. The fact remains that the Prosecution was required to prove beyond a reasonable doubt all of the other elements of the crime of terror and crimes against humanity with which the Accused was charged. The principle of proof beyond a reasonable doubt applies not only to the elements of the crime considered *in abstracto*, but also to all of the other elements indispensable for the Chamber to enter a conviction, due to the way the Prosecution had pleaded its case.⁹
 10. The Chamber erred in law by failing to establish beyond a reasonable doubt all of the essential elements to find the Appellant guilty of the crimes with which he is charged.

² Paragraphs 870 to 872 of the Judgement.

³ Paragraphs 873 to 888 of the Judgement.

⁴ Paragraphs 889 to 913 of the Judgement.

⁵ Paragraphs 914 to 938 of the Judgement.

⁶ Paragraphs 939 to 953 of the Judgement.

⁷ Paragraphs 914 to 938 of the Judgement.

⁸ Paragraph 872 and footnote 3013 of the Judgement.

⁹ *Halilović* Appeal Judgement, para. 130 and footnote 350 *in fine*.

11. The constituent elements of the crime of terror have been established in the *Galić* Appeal Judgement.¹⁰ These elements are, first and foremost, all of the constituent elements of the crime of attacks on civilians,¹¹ to which must be added the specific intent to spread terror among the civilian population.¹²
12. The so-called *chapeau* norms of Article 5 are well established in Tribunal jurisprudence¹³ and each of the said norms has subsequently been examined in greater detail by the Appeals Chamber.¹⁴
13. The constituent elements of the underlying crimes, namely murder and inhumane acts, are specified in the ICTY jurisprudence.
14. A juxtaposition of the constituent elements of the offences for which the Appellant was convicted by the Chamber shows that the common denominator of all of these offences is the attacks carried out by the SRK, under the Appellant's command, against civilians and the civilian population which, on one hand, represent the material element of the crime of terror (*actus reus*) and, on the other, the *sine qua non* of crimes against humanity, with an additional requirement, their widespread or systematic nature, assuming that the underlying crimes are constituted.

The material element of the crime of terror and the *sine qua non* of crimes against humanity

15. In paragraphs 876 and 877 of the Judgement, the Chamber deals with the question of determining the material element of the crime of terror. In paragraph 876, it gives the definition of the *actus reus* of the crime of terror by referring to the definition given by the Appeals Chamber in *Galić*, making reference to paragraphs 100 and 101 of the *Galić* Appeal Judgement. In paragraph 877, the Chamber states that the crime of terror is not limited to direct attacks against civilians, but also includes indiscriminate and disproportionate attacks, but excluding legitimate attacks against combatants.

¹⁰ Even if the wording of the Appeals Chamber is "crimes of acts or threats of violence, the primary purpose of which is to spread terror among the civilian population."

¹¹ *Galić* Appeal Judgement, footnote 351.

¹² *Galić* Appeal Judgement, paras. 100-104.

¹³ *Kunarac* Judgement, para. 410.

¹⁴ For example, the Appeal Judgements in *Kunarac*, *Blaškić*, and *Galić*.

In the same paragraph, still under the heading of *actus reus*, the Chamber discusses the specific intent to spread terror among the civilian population.

16. In fact, in paragraph 101, the Appeals Chamber in *Galić* repeats the second sentence of Article 51 (2) of Protocol I Additional to the Geneva Conventions of 1949 (“Protocol I”), which reads as follows: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”. It states that it will base its analysis of the elements of the crime of terror on that definition. In contrast to the Chamber, the Appellant understands that this definition includes both the material element and the mental element of the offence.
17. In contrast to the Chamber, the Appellant considers that in paragraph 102 the Appeals Chamber in *Galić* determines the *actus reus* for the offence it refers to as the “crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population” by relying on the provisions of Articles 51 and 49 of Protocol I, and in paragraphs 126 to 138, which apply *mutatis mutandis* to the Chamber’s findings concerning the crime of terror.¹⁵
18. Accordingly, the material element of the crime of terror includes the following elements:
 - a. acts and threats of violence
 - b. directed against the civilian population or civilian persons not taking direct part in the hostilities.¹⁶
19. One of the so-called *chapeau* elements of crimes against humanity are attacks directed against the civilian population.¹⁷
20. In paragraphs 192 to 793, the Chamber relates the evidence concerning the attacks carried out by the Appellant, and goes on to assess that evidence in part in paragraphs 794 to 798 of the Judgement, to find that:

¹⁵ *Galić* Appeal Judgement, footnote 351.

¹⁶ *Galić* Appeal Judgement, paras. 102 and 134 (referring to para. 56 of the *Galić* Trial Judgement).

¹⁷ Paragraph 916 and footnote 3095 of the Judgement; bearing in mind that according to Article 49 of Protocol I, an equal sign may be placed between the expressions “attacks” and “act of violence”...

- a. the sniper fire against civilians within the confrontation lines primarily came from SRK-held territory;
- b. as a result of that sniper fire, civilians were seriously injured and killed;
- c. the shots originating from the SRK-held territory were fired by members of the SRK;
- d. there were rumours, primarily from the SRK side, that the members of the ABiH shelled civilians living within the confrontation lines and staged incidents in order to gain sympathy from the international community;
- e. the shelling against the civilians within the confrontation lines primarily came from the SRK-held territory;
- f. as a result of the shelling, civilians were seriously injured and killed;
- g. the SRK members were behind the shelling originating from the SRK-held territory;
- h. the terror with which the Accused is charged does not result from the intensity of the armed conflict;
- i. the Chamber sees no relation between the military activities conducted by the ABiH and the criminal responsibility of the Accused.

21. The Appellant has never disputed that:

- a. the SRK under his command carried out attacks within the meaning of Article 49 of Protocol I;
- b. the said attacks, when originating from the SRK-held area of Sarajevo, were carried out by SRK members;
- c. the said attacks caused injury and death, and the suffering of certain persons within the ABiH-held territory in Sarajevo.

22. The fact remains that the Chamber has failed to establish beyond a reasonable doubt, in accordance with the applicable law, that the attacks carried out by the SRK were directed against civilians, and this invalidates the Judgement since neither the *actus reus* of the crime of terror nor any of the so-called *chapeau* elements of crimes against humanity are constituted.

Attacks (Acts and Threats of Violence)

23. The unlawful acts of violence allegedly committed by the Appellant consist of a campaign of shelling and sniping against civilian areas in Sarajevo and its civilian population.¹⁸

24. The Prosecution pleaded its case by demonstrating the commission of unlawful acts of violence by the Appellant, in particular through the various shelling and sniping incidents; the Chamber related and assessed the evidence pertaining thereto in paragraphs 192 to 724 and 752 to 760. The Appellant disputes the Chamber's factual findings concerning the individual incidents¹⁹ and considers that these findings run contrary to the Chamber's obligation to determine beyond a reasonable doubt all of the facts which underpin the Appellant's conviction,²⁰ in particular the fact that the SRK was behind an attack and, if that were the case, that the victims were civilians and that they were targeted as civilians.²¹

Directed Against the Civilian Population

25. The question of whether an attack is directed against the civilian population requires, first and foremost, a determination of the concept of civilian population and, subsequently, indicia from which it can be inferred that the attack is directed against a civilian population, according to the law applicable before the ICTY.

26. In paragraphs 174 to 188, 192 to 243, and 725 to 793 the Chamber, in muddled fashion, related the evidence concerning the civilian population and

¹⁸ Paragraph 22 of the Indictment.

¹⁹ Paragraph 11 of the Notice of Appeal filed by the Defence.

²⁰ *Ntagerura* Appeal Judgement, para. 15.

²¹ That being said, the Appellant will analyze the said factual findings in Part II of the Brief titled ERRORS OF FACT.

the fact that the SRK attacks were directed against this population to find in paragraphs 794 and 796 that as a result of the attacks carried out by the SRK civilians were seriously injured and killed.

Concept of Civilian Population

27. The Chamber erred in law by assessing the evidence, without specifically stating the law it was applying, in order to determine whether or not the population in certain ABiH-held areas of Sarajevo was civilian.²² Paragraph 894 contains the finding that the status of a population can change as a function of the flow of civilians and combatants, and in footnote 3052, refers to Section III.A.6. Nevertheless, in that part of the Judgement, there are provisions of law that the Chamber fails to apply in paragraphs 889 to 904.
28. And yet, the civilian population is a legal concept whose meaning is well-determined, both in authorities regularly applied by the Tribunal²³ and in Tribunal jurisprudence.²⁴

The civilian population is made up of all civilian persons, according to Article 50, paragraph 2 of Protocol I, whereas the definition of civilian is a negative:

“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.”²⁵

The categories excluded from the protection offered to civilians are therefore combatants and *“Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces”*.²⁶

²² Paragraphs 889 to 904 of the Judgement.

²³ Specifically the Protocol Additional to the Geneva Conventions and the “Commentary on the Protocol Additional to the Geneva Conventions”, Sandoz, Swinarski and Zimmermann, Geneva 1986 (“Commentary”).

²⁴ Specifically, the *Kunarac* Trial and Appeal Judgements, *Blaškić* Appeal Judgement, *Galić* Appeal Judgement.

²⁵ Protocol I, Art. 50, para. 1.

²⁶ Article 4 (A) (1) of Convention III of the Geneva Conventions.

29. Article 43 of Protocol I defines “armed forces”, and the Appeals Chamber, in the *Blaškić* Appeal Judgement, adopts paragraph 1677 of the Commentary, which it finds instructive:²⁷

“All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).”

In the same paragraph of the *Blaškić* Appeal Judgement, it continues:

“As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”

30. The Appeals Chamber settled the issue of a person’s status, by holding as follows:

“However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution.”²⁸

The Chamber therefore was wrong when failing to specify in paragraph 946 of the Judgement that the presumption of a person’s status, in case of doubt,

²⁷ *Blaškić* Appeal Judgement, para. 114.

²⁸ *Blaškić* Appeal Judgement, para. 111.

ceases to exist if the members of the armed forces answer before a criminal jurisdiction, which is the case of the Appellant.

31. Article 50, paragraph 3 of Protocol I provides as follows: *“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”*.

Nonetheless, in order to determine whether the presence of a combatant within a population deprives that population of its civilian character one must, in particular, take into account the number of soldiers.²⁹ Conversely, the presence of a limited number of civilians, within the meaning of the negative definition in Article 50, paragraph 1 of Protocol I, in combat areas³⁰ replete with military objectives, also should not change the military character of these areas.

32. With the exception of combatants, taken within the meaning of the *Blaškić* Appeal Judgement, in other words in any possible situation, prior to their demobilization, the military objectives are as follows:

*“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.”*³¹

Objects which by their nature make an effective contribution to military action are the following in particular: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.³²

Objects which by virtue of their location make an effective contribution to military action include in particular *“a site which is of special importance for military operations in view of its location, either because it is a site that must*

²⁹ *Idem*, para. 115.

³⁰ The Mixed Group defined combat areas as follows: “In an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located.” O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A.

³¹ Article 52, paragraph 2 of Protocol I.

³² Paragraph 2020 of the Commentary on the Protocols.

*be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it".*³³

The application of the criterion of the purpose of an object to characterize it as civilian or military is such that normally civilian objects may become military objectives if they are used for military purposes. For example, an apartment or a school becomes a military objective, by virtue of its purpose, if it is used to accommodate troops or headquarters.³⁴

As regards Article 52, paragraph 3 of Protocol I, the Appellant considers that the Appeals Chamber jurisprudence contained in paragraph 111 of the *Blaškić* Appeal Judgement applies *mutatis mutandis*, and that in cases of doubt as to the use of an object which is normally used for civilian purposes, it is up to the Prosecution to prove that the said object is not used to make an effective contribution to military action, if the criminal responsibility of a soldier is alleged.

In any case, only the Chamber may characterize an objective as civilian or military, after assessing the evidence. The Chamber erred in law by failing to make this characterization before determining that the ABiH-held areas of Sarajevo that were attacked by the SRK³⁵ were civilian areas. The said error of law resulted in the fact that the Chamber committed errors of fact in paragraphs 342, 379, 480, 896, 897, 898, 899, 900, 901, 902 and 903 of the Judgement.³⁶

³³ Paragraph 2021 of the Commentary on the Protocols.

³⁴ Paragraph 2022 of the Commentary on the Protocols.

³⁵ Within the meaning of Article 49 (1) of Protocol I.

³⁶ That being said, the Appellant will analyse the said factual findings in Part II of the Brief – Errors of Fact.

Indicia supporting the inference that an attack is directed against a civilian population

33. The expression “directed against” is an expression which means that the civilian population must be the primary object of the attack.³⁷ To determine whether the civilian population was the primary object of a given attack, the triers of fact must take into account, *inter alia*, the following indicia:³⁸

- a. the means and methods used in the course of the attack;
- b. the status of the victims
- c. the number of victims;
- d. the discriminatory nature of the attack (which may be inferred on a case-by-case basis in light of the available evidence, namely: the distance between the victim and the most probable source of fire; the distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; the appearance of the victim as to age, gender, and clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight);³⁹
- e. the nature of the crimes committed in the course of the attack;
- f. the resistance to the assailants at the time;
- g. 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.

In addition, the fact that an attack is directed against the civilian population may be inferred from the indiscriminate character of the weapon used.⁴⁰

34. The Chamber erred in law by failing to clearly set out the indicia for assessing whether or not an attack is directed against civilians and by failing to

³⁷ *Idem*, citing the *Kunarac* Appeal Judgement, para. 91.

³⁸ *Idem*.

³⁹ *Galić* Appeal Judgement, para. 133.

⁴⁰ *Galić* Appeal Judgement, para. 132.

determine beyond a reasonable doubt that the attacks carried out by the Appellant were directed against the civilian population.

Indeed, while the Chamber finds that the urban areas in the ABiH-held part of Sarajevo were civilian in status,⁴¹ and rejects the Defence argument to the contrary,⁴² it makes no determination as to the Defence argument that the military activities conducted by the SRK during the period of 10 August 1994 to 21 November 1995⁴³ were not directed against the civilian population, and disregards all of the Appellant's statements, as well as the evidence on the record, likely to demonstrate this.

Additionally, the Chamber errs in law in paragraph 798 of the Judgement by distorting the Appellant's argument and stating that the military activities of the ABiH cannot exonerate the Appellant; this runs counter to the law regularly applied before the ICTY and ICTR when determining whether an attack is directed against the civilian population.

In reality, the characteristics and consequences of the military activities of the ABiH units who were fighting against the SRK between 10 August 1994 and 21 November 1995, and even the resistance to the SRK, make it possible, along with other indicia,⁴⁴ to assess⁴⁵ whether the attacks carried out by the SRK were directed against a civilian population, which is a *sine qua non* for the Appellant's guilt, in respect of all counts in the Indictment.

35. Considering, on the one hand, the duty of the Appeals Chamber to apply the appropriate law, after determining that the Chamber committed an error of law invalidating the Judgement under appeal and, on the other hand, the fact that the Chamber completely ignored certain evidence, the Appellant will set out in this regard his analysis of the evidence likely to establish the facts from which it can be reasonably inferred that the attacks, in the cases where they were carried out by the SRK, were not directed against the civilian population.

⁴¹ Paragraphs 896 to 903 of the Judgement.

⁴² Paragraph 904 of the Judgement.

⁴³ Taken within the meaning of Article 49, paragraph 1 of Protocol I.

⁴⁴ Set out in paragraph 33 of the Brief.

⁴⁵ According to the standard for assessing evidence, i.e. beyond a reasonable doubt.

(I) Means and methods used in the course of the attack by the SRK

36. The SRK was made up of inhabitants from the VRS-held part of Sarajevo and was never more than 18,000 soldiers-strong.⁴⁶

37. In the spring of 1995, Witness W156 stated:

/Redacted/⁴⁷

38. The witnesses spoke of the enormous casualties sustained by the SRK throughout the conflict period.⁴⁸

39. During the period material to the Indictment, the SRK was short of ammunition and fuel.⁴⁹ Its equipment was ill-assorted and ageing;⁵⁰ Witness W156 continued: *“Indeed, I noted that the SRK waged war with very limited means, which explains the poor technical state of their equipment around Sarajevo.”*⁵¹

Vahid Karavelić, the ABiH 1st Corps Commander from the beginning of the period covered by the Indictment up to August 1994, confirmed that they had information indicating that since *“the army of Republika Srpska cost the army of the Federal Republic of Yugoslavia so much”* the Federal Republic of Yugoslavia simply: *“turned off the taps”*.⁵² The SRK rightfully found these sanctions worrisome⁵³ since the only military factory, *Pretis* in Vogosca, remained without resources of any kind.⁵⁴

⁴⁶ Transcript (“T.”) 4007/15 to 4008/1 and 4008/11-17 (W149)

⁴⁷ P625, under seal

⁴⁸ T. 8420/9-15 (T6, 17 July 2007); TR 6258/13-22 (T32, 5 June 2007); T. 6312/6-10 (T17, 6 June 2007); T. 8882/4-10 (T25, 2§ July 2007); T. 7133/10-18 (T48, 22 June 2007); T. 7976/4-10 (T37, 10 July 2007); T. 6044 (T28, 1 July 2007); T. 6636/20 to 6637/1 (T47, 13 June 2007); T. 6917/13-14 and 6919/11-14 (T2, 20 June 2007).

⁴⁹ T. 4009/23 to 4010/6 (W149, 26 March 2007).

⁵⁰ P625, page 23, question 3.

⁵¹ *Idem*, page 35, question 3.

⁵² D155, T. 4235/8 to 4236/2 (W70, 29 March 2007); D456 page 2, paragraph 2.

⁵³ T. 391/24 to 392/11 (W56, 15 January 2007); P816; D1 page 1.

⁵⁴ D227.

40. During the period material to the Indictment, the military industry in the VRS-held territory was not working due to the lack of necessary materials for the production and repair of weapons and ammunition.⁵⁵ Under the TEZ agreement, heavy weapons were placed under the control of international representatives or deployed outside of the 20km zone from the Sarajevo city centre.⁵⁶

(II) The extent to which the attacking forces may be said to have complied or attempted to comply with the precautionary requirements of the laws of war

41. As commander of the SRK the Appellant called on his members to take action against military objectives only, as and when it was necessary for the protection of their lives and families,⁵⁷ which the members followed, in spite of media reports to the contrary.⁵⁸ He asked them to take the necessary precautions in the event they knew that civilians could be mixed with the ABiH military objectives.⁵⁹ The text of the Geneva Conventions was posted in the SRK headquarters.⁶⁰

(III) The resistance to the assailants at the time

42. In their zones of responsibility, the SRK units fought against the BiH Armed Forces, whose military strategy between the period of 10 August 1994 and 21

⁵⁵ D227; T. 6560/4-14 (T30, 12 June 2007).

⁵⁶ T. 6035/6 to 6036/2 (T28, 1 June 2007); T. 6136/25 to 6137/12 and 6144/4-16 (T28, 4 June 2007); T. 6250/16-22, T. 6252/11-20 and T. 6269/14 to 6270/16 (T32, 6 June 2007); T. 7153/19 to 7154/14 (T48, 22 June 2007); T. 7376/13-15 (T54, 21 June 2007); T. 7436/12-18 (T52, 28 June 2007); T. 7505/17 to 7506/23 (T13, 3 July 2007).

⁵⁷ T. 61773/20 to 6174/5 and 6176/17-25 (T49, 5 June 2007); T. 5748/3-5 (T62, 29 May 2007) and D185 and D186; T. 5754/9-15, T. 5769/23-25 T62 (29 May 2007); T. 5939/13 to 5940/5, T. 5956/16-20 (T62, 31 May 2007); T. 6255/21 to 6256/7, T. 6261/10-14, T. 6267/3-7 (T32, 6 June 2007); T. 6553/20 to 6554/8, T. 6555/10-14 (T30, 12 June 2007) and D214; T. 6727/20 to 6728/6 (T23, 18 June 2007); T. 7123/21 to 7124/10 (T14, 22 June 2007); T. 7180/24 to 7181/4 (T48, 22 June 2007); T. 7294/15-23 (T59, 26 June 2007); T. 7464/19 to 7465/15 (T52, 28 June 2007); T. 7611/1-11 (T34, 4 July 2007); T. 7192/14 to 7193/4 (T27, 10 July 2007); T. 8334/10-13 (T15, 13 July 2007); T. 8477/24 to 8478/20, T. 8479/1-7 (T6, 17 July 2007); T. 8925/25 to 8926/9 (T57, 26 July 2007).

⁵⁸ T. 6176/8-16 (T49, 5 June 2007); T. 6326/11-23 (T17, 7 June 2007); T. 6707/1 to 6708/2 (T23, 14 June 2007); T.7014/12-19 (T39, 21 June 2007).

⁵⁹ T. 7460/22 to 7461/3 (T52, 28 June 2007); T. 7561/10-18 (T34, 3 July 2007).

⁶⁰ T. 7177/14-23, T. 7179/2-11 (T48, 22 June 2007); T. 7259/20 to 7260/4 (T59, 25 June 2007); T. 8871/18 to 8872/8, 8895/24 to 8896/7 and 8898/11-15 (T25, 26 July 2007).

November 1995 was to constantly mount an offensive and portray it as a defensive.⁶¹

43. The members of the BiH Armed Forces were posted throughout the ABiH-held territory of Sarajevo,⁶² together with all of the military objectives⁶³ which made an effective contribution to their military efforts.

(i) Composition and weaponry of the BiH Armed Forces fighting against the SRK

44. The number of troops in the ABiH was significantly larger than that of the SRK.⁶⁴ In August 1994, the ABiH 1st Corps was 62,899 soldiers-strong,⁶⁵ and the number of soldiers never fell below 58,000.⁶⁶ It follows from the statement of the ABiH 1st Corps commander that the structure of the said corps was complex.⁶⁷

45. Contrary to the finding of the Chamber in paragraph 190 of the Judgement, the evidence demonstrates that the Bosnian police units were part of the BiH Armed Forces.⁶⁸ The policemen were armed with pistols and machine guns, but were not necessarily in uniform.⁶⁹

46. According to Witness Martin Bell, in general all persons of weapons-bearing age were recruited into the ABiH Armed Forces.⁷⁰

47. It follows from Exhibit D392 that the troops from the ABiH 1st, 2nd, 3rd, 4th and 7th Corps acted together with HVO units against the SRK forces during the June 1995 offensive,⁷¹ and that altogether these corps were 134,075

⁶¹ D163.

⁶² P194 and D59.

⁶³ Within the meaning of Article 52, paragraph 2 of Protocol I.

⁶⁴ T. 3359/16-17 (W124, 7 March 2007).

⁶⁵ D106.

⁶⁶ D384, D385, D386, D387, D388, D389.

⁶⁷ P492, under the heading "Corps Units".

⁶⁸ D61 and D62 and T. 2117/17 to 2118/3 (W140, 14 February 2007); D190; D417; D143; D284; D144.

⁶⁹ T. 1424/15-19 and 1432/11-18 (W138, 31 January 2007); T. 2397/19 to 2398/2 (W58, 16 February 2007).

⁷⁰ T. 5289/4-14 (W157, 27 April 2007).

⁷¹ D392, page 28; confirmed by W70, 27 April 2007, T.4167/9-15 and W53 T. 3276/25 to 3277/4.

soldiers-strong.⁷² The Bosnian MUP units acted alongside ABiH units in this large-scale military operation.⁷³ The “El Mudžahedin” units took part among the ranks of the ABiH 7th Corps.⁷⁴

48. At the beginning of the conflict, the two parties “inherited” the JNA weapons and ammunition stockpiled in the depots in Sarajevo.⁷⁵ The ABiH units seized the munitions stockpiled in the *Pretis* factory in Vogosca, in particular aerial bombs.⁷⁶

49. In Exhibit P492 Vahid Karavelić describes the state of armament of the ABiH 1st Corps, which was under his command.⁷⁷ Ismet Hadžić, commander of the 4th Brigade (formerly the 104th),⁷⁸ spoke of the state of armament of his brigade battalions,⁷⁹ but it was the same in other units deployed in the ABiH zones of responsibility, in particular in the hills.⁸⁰

Weapons from the outside made it to the ABiH despite the embargo,⁸¹ with more or less difficulty.⁸²

The operation of the tunnel allowed for the movement and distribution of weapons in the ABiH-held territory in accordance with military needs.⁸³ Throughout July 1995, unknown donors sent 26 aircraft loaded with weapons to the ABiH-held territory.⁸⁴

The SRK was informed of the state of armament of the ABiH.⁸⁵ The ABiH members even boasted in the media about their heavy weapons and the people in the SRK-held territory would later feel the effects of those weapons.⁸⁶

/Redacted/⁸⁷ /Redacted/⁸⁸ According to Witness W156: /Redacted/⁸⁹

⁷² D389; D159 and T. 4251/7-14 (W70, 27 April 2007).

⁷³ T. 5784/13 to 5788/8 (T62, 29 May 2007) and D190; D417; D143; D284; D144 and W70 T. 4166/14-19.

⁷⁴ D145 and T. 4175/9-14 (W70).

⁷⁵ T.4007/7-11 and 4075/11 to 4076/2 (W149).

⁷⁶ T. 6538/6-24 (T30).

⁷⁷ P492 page 7 under the heading “Weaponry within I Corps” (W70).

⁷⁸ See its location on P194.

⁷⁹ T. 3438/5-15 (W53).

⁸⁰ D 406, para. 6; D407; D405 point 2.

⁸¹ T. 329/20-23; 416/1-5 (W56); T. 3359/16-17 (W124); D305 especially pages 7 to 10.

⁸² D427; D414.

⁸³ T. 378/12 to 379/9 (W56, 16 January 2007); T. 3358/7-13 (W124)

⁸⁴ T. 441/1-10 (W56); D305, page 5, paragraphs 2 and 3 which finishes on page 6.

⁸⁵ P336, page 4 para. 2.1.1

⁸⁶ T. 6487/13 to 6488/8 (T36) and D225.

⁸⁷ T. 5357/14-24 (W156); P19; T. 3407/22 to 3408/18 (W124); T. 540/20 to 541/10 (W41).

⁸⁸ D303; D150; D427.

The ABiH was supported, equipped and trained by the United States, for at least the winter of 1994/95.⁹⁰

The military industry under the ABiH's control was well-functioning and was capable of manufacturing or repairing all manner of weapons and ammunition.⁹¹

In their military activities the ABiH units used weapons that were previously placed under UNPROFOR control under the agreement of 9 February 1994 and deployed those weapons in the hills in their zones of responsibility in Sarajevo.⁹²

(ii) military objectives making a contribution to the military actions of the BiH Armed Forces fighting against the SRK

50. Objects which **by their nature and location** made an effective contribution to the military action of the BiH Armed Forces⁹³ were placed in all of the ABiH-held districts of Sarajevo, in the zone of responsibility of the 1st Corps,⁹⁴ namely:

Hrasnica, Sokolović Kolonija and Igman

51. UNMO Eimers stated that Hrasnica was controlled by soldiers only.⁹⁵ Map P194 indicates that it was the zone of responsibility of the 104th Brigade, which included the subordinated units.⁹⁶ Since the beginning of the conflict, intensive military activities were a constant in this zone, in particular as a result of the strong on-site presence, even before 1992, of military units of the *Patriotska Liga*, which initially was a militia of the SDA party made up

⁸⁹ P625 under seal, pages 26 and 27, under VII; T. 5377/21 to 5378/12 (W156).

⁹⁰ P585 paras. 18 and 44; T. 4814/18 to 4815/3 (W40)

⁹¹ D225; D404; T. 8786/14 to 8787/11 (T60); D411; T. 2409/10 to 2410/22 (W137); T. 3106/2 to 3107/22 (W131); Statements of Witnesses W15: D170, D171, D172 and D173, and Exhibit D174.

⁹² D423.

⁹³ According to the definition contained in paragraph 2020 of the Commentary on the Protocols.

⁹⁴ P194 and UNPROFOR map, trial record, page 5509; T. 5722/21 to 5723/25 (T62, 24 May 2007) and D110; T. 5804/4 to 5809/18 (T62, 29 May 2007) and D194; D270 and T. 7252/2-10 and 7254/7-21 (T59); D190; D417; D426; D107; D154; D219; D399; D400; D409; D429; D272; D396; D99.

⁹⁵ P585, para. 18; T. 4805/21-23 (W40).

⁹⁶ D76; T. 6487/9 to 6488/8 (T36); T. 6254/6 to 6255/3 (T32); T. 7642/23 to 7643/7 (T22); T. 6994/13 to 6995/8 (T39); T. 7000/&-6 (T39); T. 7311/10 to 7312/7 (T55); T. 8739/19 to 8740/10 and T. 8743/10 to 8744/4 (T19).

entirely of Muslims. After the creation of the ABiH, the *Patriotska Liga* was incorporated into it.⁹⁷

52. Although the Igman zone became part of the demilitarized zone following the agreements of 14 August 1993, signed between the parties under the aegis of UNPROFOR, the ABiH immediately began to violate the DMZ and completely settled there towards the end of 1994.⁹⁸ There was much fighting in and from this zone,⁹⁹ in particular towards the south.¹⁰⁰ The military activities took place especially on the road to Igman which led to the Hrasnica pocket.¹⁰¹
53. In the autumn of 1994, 200 mortars per hour were fired from the Hrasnica region in support of the ABiH attacks intended to break through towards Goražde over Igman, and the UNMOs also suspected the existence of a cannon because they could hear the sound of explosions.¹⁰² /Redacted/¹⁰³.
54. During the period material to the Indictment, the entire sector of the districts of Butmir, Sokolovica Kolonija and Hrasnica was used by the ABiH,¹⁰⁴ and /Redacted/.¹⁰⁵ To access the Igman road and Igman, and *vice versa*, the soldiers used at least two different routes, depending on the military activities, and moved mostly at night.¹⁰⁶
55. The weapons were manufactured in Hrasnica.¹⁰⁷
56. During the period material to the Indictment, the ABiH used the following main communications routes: the Igman road; the tunnel below the Sarajevo

⁹⁷ D497 paras. 4-8.

⁹⁸ T. 409/2 to 410/25 (W56).

⁹⁹ T. 4565/4-8 (W57).

¹⁰⁰ P584 page 4 para. 4; T. 4799/15 to 4700/10 (W40); D333 and T. 8525/18 to 8526/19 (T41, 18 July 2007).

¹⁰¹ T. 4798/16-22 (W40); D38.

¹⁰² P585 para. 19; T.4807/11 to 4808/10 (W40).

¹⁰³ T.4739/11 (W114)

¹⁰⁴ T. 687/1-13 (W101) and T. 3864/1-8 (W46) and D128; P858 Annex B, page 3.

¹⁰⁵ T. 6485/5 to 6486/16 (T36); T. 6751/19 to 6753/9 (T63); T. 6994/24 to 6995/8 (T39).

¹⁰⁶ T. 4570/8-9 and T. 4569/10-17 (W57); also T.687/8-13 (W101).

¹⁰⁷ D76.

airport runway /Redacted/¹⁰⁸ and the road between the mouth of the tunnel to the south and the Igman road.

57. The Igman road was also used by UNPROFOR convoys, but those who really controlled it were the BiH Government and the ABiH.¹⁰⁹

The Dobrinja-Butmir Tunnel

58. The tunnel has been operational since 1993 and in the period material to the Indictment it was fully operational.¹¹⁰ The operation of the tunnel permitted the implementation of the ABiH's new military tactic, which was to move personnel and weapons around between its various zones of responsibility.¹¹¹

59. During the entire period material to the Indictment, the tunnel was under ABiH control and served military purposes, or other purposes subject to permission from the ABiH.¹¹² It was a very important military communications route for the operations of the ABiH,¹¹³ because in particular it provided a link between Sarajevo and Central Bosnia.¹¹⁴ Likewise, the tunnel was a crucial communications link for the ABiH 4th (formerly 104th) Brigade, whose zone of responsibility was to the northeast of the airport in Dobrinja and to the southeast of the airport in Butmir, Sokolovica Kolonija and Hrasnica.¹¹⁵ A lot of ABiH weapons and soldiers entered through the tunnel into the ABiH-held territory.¹¹⁶ The tunnel also allowed all sorts of

¹⁰⁸ T. 3858/13 to 3862/17 (W46).

¹⁰⁹ P27, paras. 72, 78 and 81, T. 547/6 to 548/16 (W41); Witness W101 also testified about the use of the Igman road by the ABiH soldiers, alongside other users – T. 687/1-7.

¹¹⁰ T. 3771/19 to 3273/21 (W53); P492 page 15 under "The Dobrinja-Butmir Tunnel"; T. 8190/8 to 8191/10 and T. 8192/4-17 (T38).

¹¹¹ P492, pages 12, paras. 4 and 13 para. 4; T. 4142/2-22 (W70); T. 7313/13 to 7314/24 (T55, 26 June 2007) and D275; T. 5743/16 to 5744/5 (T62, 29 May 2007).

¹¹² T. 4142/19-22 (W70), P492 page 12 last paragraph (92 *ter* statement of W70); 4011/11 to 4012/9 (W149) and D152; T. 8150/8 to 8151/13 (T38, 12 July 2008) and D304; D275; T. 377/21 to 378/11 (W56); T. 978/10-17 (W98); T. 743/19 to 744/3 (W44); T. 1840/11-20 (W42); T.5280/2-7 (W157); T. 7304/5-24 and T. 7307/25 to 7308/1 (T55, 26 June 2007); T. 8149/24 to 8150/7 (T38, 12 July 2007).

¹¹³ T. 4225/1-7 (W70); T. 6020/23 to 6021/4 (T28); T. 5743/23 to 5744/5 (T62); T. 6934/14-22 (T2, 20 June 2007); T. 6999/6-21, (T39, 21 June 2007); T. 7307/13-17 (T55, 26 June 2007).

¹¹⁴ T. 374/12-375/2 (W56); D153 and D109; T. 6020/4 to 6021/4 (T28, 1 June 2007) and D200.

¹¹⁵ T. 1841/13-22 (W42).

¹¹⁶ T. 3358/7-13 and T. 3371/12-16 (W124); T.3287/3-23 (W53) and D109; T. 5314/ 22 to 5315/2; T. 6347/4-8 (T17, 7 June 2007).

black market activities to function.¹¹⁷ Certain international representatives did not take much interest into the operation of the tunnel, even though they knew that there was considerable movement in its vicinity.¹¹⁸ /Redacted/.¹¹⁹

Dobrinja, Mojmiilo, Alipašino Polje, Vojničko Polje

60. The district of Dobrinja was divided between the SRK and the ABiH.¹²⁰ The ABiH units in Dobrinja acted against the SRK in Nedžarići.¹²¹ The snipers posted in the buildings in the ABiH-held part of Dobrinja fired upon the SRK-held territory.¹²² The 104th Brigade units headquarters were in Dobrinja and Vojničko Polje.¹²³ The entry into the tunnel was also located in Dobrinja; 9.5km of trenches.¹²⁴ The soldiers slept in their apartments¹²⁵ and the frontlines passed through the buildings.¹²⁶
61. Mojmiilo is a hill, a sort of long ridge to the south of the district of Alipašino Polje, which was under ABiH control during the period material to the Indictment.¹²⁷ The territory held by the SRK was to the south and at the foot of Mojmiilo, in such a way that from Mojmiilo the ABiH units fired at the SRK in

¹¹⁷ T. 379/16 to 380/21 (56).

¹¹⁸ T. 3862/18 to 3863-22 (W46) or T. 524/2-12 (W41); T. 4019/14-18 (W149).

¹¹⁹ As an example, but the same goes for all the SITREPs: P866 page 7 of Annex C : UNMO was denied access to the area of Dobrinja; P835 page 7 of Annex C and also T. 3863/1-7(W46) and T. 688/18-22 (W101).

¹²⁰ T. 2482/24 to 2483/2 (W137); T. 8930/20-25 (T57).

¹²¹ T. 7144/3 to 7145/9, T. 7146/17 to 7147/18 (T48, 2 June 2007) and D159 and D160; T. 7561/19 to 7562/5 (T34, 3 July 2007).

¹²² D323 and T. 8493/13 to 8498/9 (T41, 18 July 2007).

¹²³ D108, pages 9 and 10.

¹²⁴ D108, page 8.

¹²⁵ D108, page 10.

¹²⁶ D108, page 9.

¹²⁷ T. 1770/18-22 (W42); T. 1419/14-23 (W138); T. 2391/13-23 (W58); T. 4739/8-10 (W114); D196; T. 5973/22 to 5974/9 (T28); T. 5719/22 to 5720/6 (T62); T. 6308/13-18 and T. 6311/5 to 6312/5 (T17); D215; T. 6047/12 to 6048/4 (T28); D206; T. 6994/13 to 6995/8 (T39). In paragraph 122 the Chamber distorts the testimony of Witness Dražen Maunaga-T36 who testified that the ABiH held the summit of the Mojmiilo ridge: T. 6481/18-20 and 6482/8-10. T. 6994/24 to 6995/8 (T39). D330 and T. 8521/23 to 8522/24 (T41, 18 July 2007).

Lukavica and Nedžarići,¹²⁸ on Ozrenska Street,¹²⁹ on Grbavica¹³⁰ and on the part of Dobrinja held by the SRK.¹³¹

62. The ABiH artillery and infantry fired at the SRK from Vojničko Polje and Alipašino Polje.¹³² The SRK-held territory of Nedžarići, on the opposite side, sustained fire from the ABiH units.¹³³ As David Harland demonstrated before the Chamber, this district is to the north of the Sarajevo Airport and surrounded on three sides, with a small sort of outlet, by the ABiH units; this was corroborated by Luka Dragičević.¹³⁴ In the district of Vojničko Polje, the confrontation line was close to the buildings facing Nedžarići; soldiers, some uniformed and some not,¹³⁵ lived in these buildings and /Redacted/.¹³⁶

Stup, Stupska Petlja

63. The ABiH units with their weapons were in the territory towards Ilidža, namely: Stup, Stupska Petlja, and refrigerated warehouses.¹³⁷

64. From these positions the ABiH fired onto Nedžarići.¹³⁸

Sokolje, Briješko Brdo, Žuč, Hum, Velešiči, Pofalići

65. The ABiH occupied not only Igman, but also other hills around the city centre¹³⁹ and other districts of the city.¹⁴⁰ With its units and weapons the ABiH occupied Mounts Žuč,¹⁴¹ Hum,¹⁴² Sokolje and Briješko Brdo.¹⁴³

¹²⁸ T. 7372/15-20 and 7374/11-16 (T54); D206; T. 6674/15-17 (T31); D159 and D160 and T. 7144/3 to 7147/18 and T. 7149/19-16 (T48); T. 7243/1-11 (T59).

¹²⁹ T. 6311/23 to 6312/10 (T17).

¹³⁰ D331 and T. 8523/5 to 8524/2 (T41, 18 July 2007).

¹³¹ T. 6486/5-9 (T36).

¹³² T. 8793/25 to 8794/14; 8820/6-7 and 8821/17-27 (T60); D406, point 6; D142; D423; D195; D426; D412; D160.

¹³³ D334 and T. 8526/21 to 8527/16 (T41, 18 July 2007) and P909, which represents the same building as C10, photo 4.

¹³⁴ T. 370/13 to 371/1 (W56); T. 4044/11-14 (W149).

¹³⁵ T. 917/6-25, T. 920/7-9, T. 923/16-21 (W62, 23 January 2007).

¹³⁶ T. 925/24 (W62, 23 January 2007).

¹³⁷ D 412, last page, second to last paragraph; D142; D160; D250 and T. 6921/14 to 6922/7 and 6924/4-9 (T2); D251 and T. T.6924/20 to 6925/1 and 6925/17 to 6926/2 and 6936/5 to 6937/19 (T2); D271.

¹³⁸ T. 7149/17-21 (T48).

¹³⁹ T. 1434/17 to 1434/19 (W138).

¹⁴⁰ T. 999/18-1000/8 (W98); T. 3611/8-11 (W76).

66. In this combat zone the warring parties regularly confronted one another during the period material to the Indictment.¹⁴⁴ From the hills of Žuč the ABiH units attacked the districts of Vogošća¹⁴⁵ and Rajlovac,¹⁴⁶ and from Mount Hum attacked the district of Vrace.¹⁴⁷

67. The ABiH cannon fired on the SRK positions from Pofalići.¹⁴⁸

PTT, RTV

68. The ABiH heavy weapons operated from these buildings.¹⁴⁹

Pavle Goranin Neighbourhood, Viktor Bubanj Barracks

69. This was the zone of responsibility of the ABiH 1st Corps 101st Brigade.¹⁵⁰ The soldiers and the weapons under this unit's control operated against the SRK.¹⁵¹

Marin Dvor, Vrbanja Most, Jewish Cemetery

70. In the ABiH-held territory of Marin Dvor there were several buildings in which ABiH units had combat positions, in particular that of the Parliament,¹⁵² UNIS,¹⁵³ the Holiday Inn Hotel, the Government,¹⁵⁴ the Faculty of

¹⁴¹ T. 1770/13-17 (W42); D398; D423; D426, point 6; T. 6016/11 to 6017/3 (T28) and D200; T. 5724/16-21 and 5792/12 to 5794/22 (T62) and D191; T. 6246/3-13 and 6248/12-17 (T32); T. 8356/7-16 and 8358/2-9 (T9).

¹⁴² T. 3613/ 11-20 (W76); 744/23 to 745/4 (W44); T. 4739/2-3 (W114); D267- photo no. 60 and T. 7247/20 to 7248/7 (T59).

¹⁴³ D194; D406 point 6; D426 point 6; T. 6018/11-18 (T28) and D200; T. 6254/6 to 6255/3 (T32).

¹⁴⁴ T. 3271/3-7 (W53).

¹⁴⁵ T. 368/21 to 369/1 (W56).

¹⁴⁶ T. 8139/22 to 8141/15 (T38).

¹⁴⁷ D332 and T. 8524/10 to 8525/9 (T41).

¹⁴⁸ T. 6198/19 to 6200/25 , T. 6218/3 to 6219/4 (T49) and D209; T. 7250/6-21 (T59); D271, D269 and T. 7250/10-21 (T59).

¹⁴⁹ P 519.

¹⁵⁰ P194.

¹⁵¹ D195, point 5; D494; D462; D463; D216; D430; D431; D432; D433; 6674/15-26 (T31).

¹⁵² T. 2189/10-15 (W22).

¹⁵³ T. 2251/9 to 2254/9 (W22); D68.

¹⁵⁴ P362; T. 3633/2-17 (W76).

Mathematics,¹⁵⁵ and the former Marshal Tito barracks.¹⁵⁶ This district was separated by the Miljačka river from Grbavica, held by the SRK, and from there the ABiH units fired upon Grbavica.¹⁵⁷ The ABiH members fired much more than the Serbian soldiers.¹⁵⁸ The 101st Brigade had snipers who also acted against Grbavica.¹⁵⁹ Both factions had combat positions on both sides of Zmaja od Bosne Street,¹⁶⁰ referred to as “Sniper Alley” during the conflict, and the ABiH fired at the Metalka building.¹⁶¹

Grbavica was surrounded on three sides by the frontline,¹⁶² namely the Miljačka river and the buildings on two sides of the frontline controlled by the SRK and the ABiH, respectively, which, in the military sense, in conditions of urban warfare, represented combat positions, in the same way trenches do in other conditions.¹⁶³ Debelo Brdo overlooks this part of Sarajevo¹⁶⁴ to the southeast, under ABiH control, with an UNPROFOR observation post on the highest part.¹⁶⁵ The Hrasno district is to the west of Grbavica, under ABiH control. From a military standpoint it was a very difficult position to hold.¹⁶⁶ This district was very much endangered because of the fighting.¹⁶⁷

Around the Vrbanja bridge, which was the separation line, to the east, there were no civilian activities.¹⁶⁸

71. The parties to the conflict shared control of the Jewish Cemetery and in this zone there were many exchanges of fire.¹⁶⁹

¹⁵⁵ T. 8506/15-23 and T. 8498/16-25 (T41, 18 July 2008) and D324.

¹⁵⁶ T. 6093/22-25 (T28, 4 June 2008); D324 and T. 8503/7-10 (T41, 18 July 2008).

¹⁵⁷ T. 8765/3-5, T. 8766/20-25 and T. 8768/1-6 (T4); D347; D348; D349 and T. 8770/23 to 8771-5 (T4); D350 and T. 8772/24 to 8773/1 (T4); T. 6307/13-18 (T17) and D215; T. 6312/25 to 6313/6 and T. 6324/22 to 6325/5 (T17); D425, point 2; T. 7243/1-11 (T59); T. 7670/16-23 (T11, 5 July 2007).

¹⁵⁸ T. 395/18-24 (W56, 15 January 2007).

¹⁵⁹ P194, for the zone of responsibility of the 101st Brigade) and D430, D431, D432 and D433.

¹⁶⁰ T. 5275/23 to 5276/4 and T. 5276/12-18 (W157); T. 2664/16 to 2665/9 5 (W152); T. 5981/16 to 5982/9 and T. 5985/19 to 5987/17 (T28).

¹⁶¹ D335 and T. 8527/22 to 8529/16 (T41, 18 July 2007).

¹⁶² D215; T. 369/20 to 370/12 (W56); T. 4742/22-23 (W114); T. 5986/1 to 5987/1 (T28).

¹⁶³ T. 1862/12 to 1864/11(T42); T. 8765/3-5 (T4); T. 6324/17 to 6326/8 (T17).

¹⁶⁴ T. 713/1-3 (W44).

¹⁶⁵ T. 1846/7 to 1847/11(T42) and Map D46; T. 365/24 to 366/11 (W56); T. 2234/15-17 (W22).

¹⁶⁶ T. 518/1-19 (W41).

¹⁶⁷ T. 5288/7-9 (W157).

¹⁶⁸ T.2663/25 to 2664/13 (W152).

¹⁶⁹ T. 4744/9-22 (W114).

Bistrik, Trebević, Debelo Brdo, Čolina Kapa, Brajkovac

72. Čolina Kapa (940 m), one of the peaks of Mount Trebević, was also under ABiH control, allowing it to dominate, in the military sense, the old town, but also the entire territory on both sides of the Miljačka,¹⁷⁰ as well as Zlatište Street.¹⁷¹
73. The domination of Debelo Brdo gave the ABiH control of the city centre, as well as the Grbavica territory and the area around the Jewish Cemetery held by the SRK, and for this reason the ABiH wanted to maintain, and the SRK to prevent, this domination.¹⁷²
74. The ABiH combat positions were on the slopes of Trebević.¹⁷³ It was the zone of responsibility of the 111th Brigade¹⁷⁴ which fired onto the territory held by the SRK.¹⁷⁵

Sedrenik

75. Grdonj, a mountain to the northeast of the centre of Sarajevo, was held by the ABiH forces.¹⁷⁶ Sedrenik is at the foot of Grdonj.¹⁷⁷
76. This was the zone of responsibility of the ABiH 1st Corps 105th Brigade.¹⁷⁸
/Redacted/.¹⁷⁹
77. In paragraph 140 of the Judgement, the Chamber concludes that Špicasta Stjena was held by the SRK, although the ABiH was at the foot of the

¹⁷⁰ T. 1994/13-23 and 2025/25 to 2026/11 (W75).

¹⁷¹ T. 8758/18-25 and T. 8776/20 to 8777/8 (T4); D328 and D329 and T. 8516/7 to 8519/11 and T. 8519/13 to 8520/23 (T41, 18 July 2007).

¹⁷² T. 713/1-7 and 746/ 10 to 748/21(W44); T. 8761/3-8 (T4). T. 6071/22 to 6072/14 and T. 6075/12-16 (T28) and P753; T. 5720/14-25, T. 5726/6-21 and T. 5744/20 to 5745/1 (T62); T. 6217/23-25 (T49); T. 6306/17-22 (T17).

¹⁷³ T. 3088/15-23 (W12); T. 6186/9-25 and T. 6189/25 to 6190/6 (T49) and D208.

¹⁷⁴ T. 5792/12 to 5794/22 (T62) and D191.

¹⁷⁵ T. 6183/15-19 (T49); T. 7850/12 to 7851/2 (T61).

¹⁷⁶ T. 4739/20-22 (W114).

¹⁷⁷ T. 8422/23-25 (T6).

¹⁷⁸ P194.

mountain. The evidence demonstrates however that in this sector the fighting between the two sides, in particular to take and retake Špicasta Stjena, was virtually nonstop.¹⁸⁰ Considering the presence of 105th Brigade units in Sedrenik and in Grdonj,¹⁸¹ it can be reasonably concluded that the Sedrenik area contained numerous military objectives, in particular soldiers from units of the ABiH 1st Corps 105th Brigade, their weapons, their headquarters and the areas in which they moved around.

Koševo Sector

78. The ABiH had its combat positions near the hospital in Koševo.¹⁸²

79. Objects which, by virtue of the purpose attributed to them by the ABiH, made an effective contribution to the military action of the BH Armed Forces¹⁸³ were placed in all of the districts of the ABiH-held part of Sarajevo.¹⁸⁴ On the Igman road towards the mouth of the tunnel in Butmir, the ABiH used the same vehicles to transport both supplies and military equipment, as well as goods intended for civilian use.¹⁸⁵ Buses that were used to transport combatants moved around the city.¹⁸⁶ The combatants took the tram along with civilians.¹⁸⁷

80. Military objectives such as the headquarters of ABiH units could be found in buildings that appeared civilian;¹⁸⁸ /Redacted/;¹⁸⁹ the combat positions were in buildings which, in peacetime, were intended to accommodate civilians¹⁹⁰ and

¹⁷⁹ D417; D281; D473; D313 to D318; D469; T. 6014/24 to 6016/10 (T28) and D200; T. 5724/1-12 and T. 5745/3-8 (T62); T. 3725/6-16 (W38) and D123; T. 7521/10 to 7522/7 (T13) and D281; T. 8419/14 to 8420/20 (T6).

¹⁸⁰ Paragraphs 131 to 136 of the Judgement.

¹⁸¹ P194.

¹⁸² P391; T. 8796/9-13; T.8853/21-25 and T. 8854/16 to 8855/2 (T60).

¹⁸³ According to the definition contained in paragraph 2022 of the Commentary on the Protocols.

¹⁸⁴ P194 and UNPROFOR map, trial record, page 5509.

¹⁸⁵ T. 4805/5-7 and 4811/2 to 4812/3 (W40).

¹⁸⁶ D153- buses transported combatants from the 105th, 102nd, 101st and 115th Brigades so they could go through the Dobrinja - Butmir tunnel.

¹⁸⁷ P175, paragraph 4.

¹⁸⁸ T. 686/1-3 (W101); T. 6681/10-22 (T31).

¹⁸⁹ T.3861/4-11 (W46).

¹⁹⁰ T. 1862/12 to 1864/11 (W42); T. 4758/7-18 (W114); T. 2665/18 to 2666/5 (W152); T. 8815/14 to 8817/22 and T. 8844/8-11 (T60) and D352; D413, points 3. and 7.

even schools.¹⁹¹ The combatants with the zone of responsibility in the ABiH-held part of Sarajevo slept and rested in the buildings throughout the city.¹⁹² The ABiH mortars were positioned wherever the soldiers chose to put them, which was the case throughout the conflict.¹⁹³

(iii) ABiH actions which expanded the military objectives

81. Mr Fraser, an officer with UNPROFOR stated as follows: *“The Muslim mortars would move around the city and they would fire -- making it very, very difficult for the Serbs to reply because they were intermingled and mixed in with civilians. And they did that purposely because it would make it hard, and if there was a response, it would be, you know, putting civilians at risk.”*¹⁹⁴

The same fact was corroborated by other witnesses, namely General Nikolaï, UNPROFOR Chief of Staff for Bosnia and Herzegovina,¹⁹⁵ Mr Luka Dragičević, SRK assistant commander for moral guidance, religious and legal affairs and Mr Vahid Karavelić, Commander of the ABiH 1st Corps during part of the period material to the Indictment.¹⁹⁶ The other weapons were also transported on vehicles, even those which appeared to be civilian.¹⁹⁷

(iv) Chronology of military activities of the BH Armed Forces fighting against the SRK

82. The fighting between the warring parties changed in intensity, but continued uninterrupted,¹⁹⁸ and this meant that UNPROFOR forces found themselves in the midst of the conflict.¹⁹⁹

¹⁹¹ D494; T. 6674/15 to 6675/1 and T. 6681/5-22 (T31); T. 7258/19-23 (T59).

¹⁹² P646, page 5 para. 8 and page 8, last paragraph; T. 4579/23-25 (W57, 17 April 2007); T. 917/6-25 (W62).

¹⁹³ T. 535/7-17 (W41); facts no. 8 proposed by the Defence, of which the Chamber took judicial notice, 29 August 2007; P891 page 14; T. 701/14-20 (W44)

¹⁹⁴ T. page 1808/4-8 (W42), but also T. 996/25 to 997/17 and 997/18 to 999/2 (W98).

¹⁹⁵ T. 964/12-17 (W98).

¹⁹⁶ T. page 4016/21 to 4017/1 (W149); P492 page 15, paragraph 2.

¹⁹⁷ T. 4812/4-9 (W40); T. 7993/8-17 (T26).

¹⁹⁸ T. 3868/7-9 (W46); T. 7538/5-9 (T13).

¹⁹⁹ T. 3349/7-23 (W124).

83. The commander of the ABiH 1st Corps, whose zone of responsibility was Sarajevo, explains most adequately the military reasons for the fighting in the period from the summer of 1994 to the end of the war:

"It was soon apparent that to attempt to break out from within Sarajevo would not be successful, and that the only successful operations would have to take place outside the city. We therefore changed out tactics in 1994, and attempted to move much of our force outside the city, to enable a manoeuvre battle to be fought in the areas outside Sarajevo. This also enabled us to concentrate our forces where the enemy was weaker.

*An indication of the seriousness of these attacks is shown by the combat deaths of two brigade commanders ZAJKO and ŠEHOVIĆ and the Vareš Divisional commander. We held on to Žuč, which we consolidated, but had lost a lot of ground outside Sarajevo. In the beginning of 1994 we started to counter-attack and many of our forces moved out of the city, which we had concluded could not be successfully defended from within. During 1994 we regained much of the ground that we had lost during VRS offensive, and we attempted to encircle part of the VRS forces that were surrounding Sarajevo."*²⁰⁰

Journalist Martin Bell stated that the Serbs were on the defensive in 1995 and the ABiH, together with the HVO, was on the offensive.²⁰¹

It is an established fact that the ABiH was constantly violating the DMZ on Igman in order to achieve its strategy, as explained by Mr Karavelić (quotation above).²⁰²

As the SRK was sanctioned on 5 August 1994 for violating the agreement on the TEZ, the ABiH started doing the same afterwards but was not subjected to any sanctions.²⁰³

In August 1994, the military situation in Sarajevo was relatively calm²⁰⁴ with some incidents occurring in the suburbs;²⁰⁵ it continued this way until early September.²⁰⁶

²⁰⁰ P492, pages 12 para. 4 and 13 para. 4; T. 4142/25 to 4143/11 (W70); T. 8430/22 to 8431/8 (T6).

²⁰¹ D178 page 14 and T. 5281/9 to 5282/7 (W157).

²⁰² D381.

²⁰³ D111; D383; D113; Commenting on Exhibit D111, W53 stated that ABiH soldiers were happy about the NATO bombing, T. 3436/9-20.

But on 18 September 1994, the ABiH forces launched attacks to cut off and seize the communication route of Vogošća-Pale, which was vital for the SRK.²⁰⁷ With the intervention of General Rose the situation calmed down,²⁰⁸ but the ABiH orders were always offensive in nature.²⁰⁹

Autumn 1994

84. The ABiH continued to violate the DMZ in October, following the recommendations of the 1st Corps Commander, Vahid Karavelić,²¹⁰ and UNPROFOR reacted.²¹¹ There was an incident on 6 October during which the ABiH attacked SRK units in Igman, including a medical company, while passing through the demilitarised zone.²¹²
85. Fighting further intensified in November.²¹³ Soldiers of the ABiH shot at the convoy which was supposed to be accompanying their own Prime Minister, Haris Silajdžić.²¹⁴ ABiH soldiers moved on Grbavica on 10 November.²¹⁵ UNPROFOR compiled a list of incidents that took place between 16 and 17 November 1994.²¹⁶ One can see that on 16 November at about midnight, ABiH soldiers operated from the Presidency, the UNPROFOR Residence for Bosnia and Herzegovina and Koševo Hospital, and continued with the operation the next morning. The next day, the SRK fired at certain ABiH military objectives. UNPROFOR officials lodged protests with both sides but, strangely, the report sent by UNPROFOR headquarters in Zagreb to Kofi Annan²¹⁷ mentions on page 6 only the actions taken by SRK soldiers against the Presidency, ignoring the fact that this was a lawful response against a

²⁰⁴ P820.

²⁰⁵ P821; P860; P861; the ABiH also shot at international representatives: D375, D374.

²⁰⁶ P863; P793; P207; P203.

²⁰⁷ D3 and P816; T. 8429/16-22 (T6).

²⁰⁸ P906, but concerning the reaction of the ABiH *see* D382, page 5 and D377, and for what happened: D156 under *Our Forces*; P2, page 28687/6-16.

²⁰⁹ D156 and T. 4240/18-19 (W70).

²¹⁰ D53.

²¹¹ D5; T. 391/14-16 (W56).

²¹² T. 409/2 to 410/25 (W56); D131; D132; T. 3883/20 to 3885/5 (W46); D336 and D337 and T. 8531/11 to 8533/7 and T. 8533/8-19 (T41, 18 July 2007).

²¹³ T. 7896/1 to 7897/13 (T27, 9 July 2007) and D290.

²¹⁴ D147.

²¹⁵ D448.

²¹⁶ P391.

²¹⁷ P866.

military objective (the Presidency) from which their enemies had been firing at them.²¹⁸ In the aforementioned UNPROFOR headquarters report, mention is also made of actions taken by both sides in the recurrent combat zones, specifically Ilidža/Hrasnica and Grdonj.²¹⁹ UNPROFOR headquarters in Zagreb sent another report to New York in which it again failed to mention the military actions taken by the ABiH and, without any tangible evidence, accused the SRK of the death of “*a boy of five and the wounding of his mother*”.²²⁰ Fighting between SRK units and the ABiH continued and tensions were high, but the situation was calmer, except for the actions taken by the ABiH on the Krupac district to the southeast.²²¹

Winter 1994/1995

86. It is clear from the reports of the international representatives tendered into evidence that the month of December was tense and that the fighting continued in the habitual combat zones such as Grbavica, Špicasta Stjena and Nedžarići.²²²

Spring and Summer 1995

87. Fighting between the warring parties intensified from April²²³ onwards in the spring of 1995, and by 16 June 1995 it had turned into a large-scale offensive of the ABiH.²²⁴ Certain witnesses remember the summer of 1995 as the season of the most intensive fighting between the two armed forces.²²⁵

88. In April, UNPROFOR subjected two Serbian Army liaison officers to mistreatment.²²⁶

²¹⁸ P391, page 2 point 5.

²¹⁹ P866, page 5 under Sarajevo TEZ.

²²⁰ P868 pages 2 and 8, compare with paragraphs 184 to 224 of the Brief.

²²¹ D447.

²²² P835, P859, P864, P869, P760, P852, P826, P828, P829, P867, P830, P831, 832, 833.

²²³ P884, P885; T. 710/14-18 (W44); T. 7668/13-21, T. 7671/10-23 (T11, 5 July 2007).

²²⁴ P16, page 2, para. 2.

²²⁵ T. 5240/3-7 and T.5239/4-8 (W157).

²²⁶ D182 and T. 5317/3-19 (W157).

89. In early May, there was an increase in the number of incidents of exchange of fire between the SRK and the ABiH, especially in the Igman sector and at the Dobrinja-Butmir tunnel,²²⁷ but also /Redacted/.²²⁸ Despite the NATO ultimatum of 9 February 1994, the parties to the conflict began firing freely with heavy weapons, though without causing many deaths or injuries.²²⁹ The ABiH units firing on Lukavica initiated the artillery shelling.²³⁰
90. Military activities subsequently calmed down, but fighting persisted in the habitual combat zones, namely Butmir/Ilidža and Grbavica/Debelo Brdo.²³¹ The situation remained tense at the end of May, with the most intense fighting being in the zone of Sedrenik and Zetra, and then further deteriorated.²³² General Rupert Smith, UNPROFOR Commander for Bosnia and Herzegovina, described the fighting between the warring parties in his own manner (describing, for reasons which are not entirely clear, the military activities of the SRK as *bombings* and those of the ABiH as *provocations*).²³³ Mr Louis Fortin, the military assistant of General Gobillard, the then Commander of the Sarajevo Sector, referred in his statement and before the Chamber to events which took place as from 24 May 1995 and the discriminatory reaction UNPROFOR and NATO had against the SRK, whose military objectives were bombed by NATO.²³⁴ The SRK members had the feeling that UNPROFOR was punishing them in a biased manner.²³⁵ In his letter of 26 May 1995 to Mr Kofi Annan, Mr Akashi explained the reasons for the punitive measures taken against the Serbs, but did not at all mention the fighting that took place between the two warring parties, nor the attacks carried out by the ABiH which caused the SRK counterattack carried out with four heavy weapons taken from the collection point.²³⁶

²²⁷ D451.

²²⁸ T. 1014/1-11 (W98); T. 3902/10-15 and T. 3903/9-12(W46); D281; T. 8165/3-20 (T38, 12 July 2007) and D308.

²²⁹ D12; D142.

²³⁰ *Idem*, page 2; T. 3650/15 to 3651/6 and T. 3652/7-12 (W76).

²³¹ P887, D452, D454.

²³² P888, P889.

²³³ P334, para. 60 (W124).

²³⁴ P27 paras. 33 and 49 and T. 543/13 to 545/18 (W41).

²³⁵ T. 4021/12-16 (W149).

²³⁶ P340.

91. After the NATO bombings of 25 and 26 May 1995, requested by the UNPROFOR Commander for Bosnia and Herzegovina, relations between the SRK and UNPROFOR deteriorated because the VRS began detaining about a hundred UNPROFOR members as prisoners of war, according to its commander, General Mladić.²³⁷

92. /Redacted/ Witness W156 stated the following:

/Redacted/.²³⁸

93. The ABiH had long prepared the offensive that was launched on 15 and 16 June 1995 and the international representatives were already aware of this.²³⁹ There was already intense fighting on both sides of the Miljačka river on 7 and 8 June.²⁴⁰

94. Exhibit D392 shows the general order for the preparation and launching of the offensive of June 1995. It follows from the said document that the men from the ABiH 1st, 2nd, 3rd, 4th and 7th Corps, as well as HVO units, operated together against SRK forces,²⁴¹ and that together these corps were 134,075 soldiers-strong.²⁴²

95. The ABiH offensive of June 1995 took place along all of the confrontation lines,²⁴³ and was very intense,²⁴⁴ as enormous quantities of ammunition were used.²⁴⁵ Besides the heavy weapons used regularly by the ABiH units during the period material to the Indictment, the ABiH took back, during the June

²³⁷ P27, paras. 50 to 60.

²³⁸ T. 5350/20 to 5352/2 (W156).

²³⁹ T. 3391/20 to 3392/14 (W124); T. 4169/5-8.

²⁴⁰ T. 5315/24 to 5315/3 (W157).

²⁴¹ D392, page 28; confirmed by W70 T.4167/9-15 and W53 T. 3276/25 to 3277/4; T. 7892/20 to 7895/12 (T27, 9 July 2007) and D282.

²⁴² D389; D159 and T. 4251/7-14 (W70).

²⁴³ T. 3371/15-21 (W124, 7 March 2007); T. 2012/8-17 (W75, 13 February 2007); D270; D417; D109; D281; D413, W149 confirmed this for the Nisići zone and Trnovo zone, T. 4024/2-6; D464; D191; T. 5795/6 to 5797/11 (T62, 29 May 2007) and D192 and D193; D504; D505; D507; D465; D472; D473; D436; D474; D437; D466; D467; D468; D313; D469; D206; D428; D161; D273; D419; D470; D471; D162; T. 6256/15-35 (T32, 6 June 2007); T. 6440/14-16 (T53, 11 June 2007); T. 6555/24 to 6556/4 (T30, 12 June 2007); T. 7438/5 to 7440/4 (T52, 28 June 2007); T. 7526/12 to 7527/24 (T13, 3 July 2007); T. 6042/13 to 6044/1, T. 6049/6 to 6050/4 (T28, 1 June 2007); T. 6084/&-8 (T28, 4 June 2007); T. 6636/9-17 (T47, 13 June 2007).

²⁴⁴ T. 2010/20 to 2011/4 (W75, 13 February 2007); T. 7674/13-23 (T11, 5 July 2007).

1995 offensive, the heavy weapons that had previously been placed under UNPROFOR control, and operated against SRK units from the high ground it held.²⁴⁶ During the offensive, the commanders of the ABiH units advocated diversionary tactics on the territory under the control of the SRK.²⁴⁷

96. The ABiH was successful during the June 1995 offensive and took positions that had been held formerly by SRK units, in particular Zlatište, an important slope on Trebević.²⁴⁸

97. The ABiH offensive attacks lasted several months²⁴⁹ and on all of the confrontation lines, with the participation of the ABiH 4th and 7th Corps and units of the Bosnian MUP.²⁵⁰ When he heard of the American initiative to put an end to the conflict in Bosnia and Herzegovina, the ABiH commander ordered an escalation of the military activities.²⁵¹ In the period between May 1995 and the end of the conflict, the ABiH units used an enormous quantity of ammunition, which shows the intensity of their military actions against SRK units.²⁵²

98. After the NATO air strikes on the SRK-held territory, the ABiH 1st Corps employed its forces in military activities synchronized with those of UNPROFOR.²⁵³ In September 1995, the SRK capitulated,²⁵⁴ and the military activities of the parties virtually came to a halt.²⁵⁵ According to David Harland, the conflict ended in October 1995.²⁵⁶

²⁴⁵ D76.

²⁴⁶ D398.

²⁴⁷ D154; D219; D399; D429, D400, D272.

²⁴⁸ D282; D402; D403; D401; T. 5287/ 20-24 (W157); D118.

²⁴⁹ D408; D62; T. 4051/2-7 (W149); T. 422/10 to 423/3 (W56); D236; T. 8045/18 to 8046/4 (T56, 11 July 2007).

²⁵⁰ D107 and T. 3282/11-20 (W53), T. 7315/13 to 7318/17 and T. 7385/13 to 7387/6 (T55, 26 June 2007) and T. 7564/5 to 7566/13 (T34, 3 July 2007); D397, D426; D428;

²⁵¹ D151.

²⁵² D188; D189; D308; D95; D410; D284; D192; D193; T. 5792/12 to 5794/22 (T62, 29 May 2007) and D191; D436; D420; D437; D206; D313; D161; D162, D273; D419; D160; D217, D425; D118, D421.

²⁵³ D424.

²⁵⁴ T. 736/2-6 (W44).

²⁵⁵ T. 736/13-25 (W44).

²⁵⁶ T. 325/13 and T. 327/10-11 (W56).

(v) Consequences of the military activities of the BH Armed Forces fighting against the SRK

99. The attacks carried out by the ABiH units from the territory it held in Sarajevo²⁵⁷ claimed many victims in the SRK-held territory.²⁵⁸ The evidence demonstrates that the injuries and deaths of people in the SRK-held territory were caused by firearms and by explosions of shells from artillery pieces.²⁵⁹

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

100. The Appellant considers that the Chamber failed to determine beyond a reasonable doubt, first, the number of victims of the attacks carried out by the SRK and, second, the civilian status of the victims and, consequently, erred in law in paragraphs 794 and 796, by concluding that:

“As a result of the sniping civilians were seriously injured or killed” and “As a result of the shelling civilians were seriously injured or killed”.

²⁵⁷ P194.

²⁵⁸ T. 6005/18 to 6006/9, T. 6044/5 to 6045/22 (T28, 1 June 2007); T. 5787/19 to 5788/8, T. 5929/15 to 5930/2 (T62, 29 May 2007); T. 6164/8-18 (T49, 5 June 2007); T. 6254/24 to 6255/3, T. 6258/13-22 (T32, 6 June 2007); T. 6311/23 to 6312/10 (T17, 6 June 2007); T. 6325/17-20, T. 6345/21-11 (T17, 7 June 2007); T. 6412/15-20 (T53, 11 June 2007); T. 6487/15 to 6488/8, T. 6508/22 to 6509/2 (T36, 12 June 2007); T. 6548/1-9 (T30, 12 June 2007); T. 6626/15 to 6627/3, T. 6636/20 to 6637/1 (T47, 13 June 2007); T. 6697/5-12, T. 6700/13-22 (T23, 14 June 2007); T. 6919/11-14, T. 6935/5-15 (T2, 20 June 2007); T. 6994/13 to 6995/8, T. 7000/1-6 (T39, 21 June 2007); T. 7095/14 to 7096/18 (T14, 22 June 2007); T. 7143/3-5, T. 7190/9 to 7191/1 (T48, 22 June 2007); T. 7311/10 to 7312/7 (T55, 26 June 2007); T. 7383/13 to 7384/19, T. 7387/21 to 7388/10 (T54, 27 June 2007); T. 7440/18-20 (T52, 28 June 2007); T. 7513/24 to 7514/4, T. 7527/3-24 (T13, 3 July 2007); T. 7675/18 to 7677/5 (T11, 5 July 2007); T. 7553/1-4, T. 7559/7-11, T. 7560/17 to 7561/4, T. 7562/3-15, T. 7611/15 to 7612/2 (T34, 3 July 2007); T. 7625/16-18 (T22, 4 July 2007); T. 7890/18 to 7891/8, T. 7891/19 to 7892/1, T. 7893/12 to 7894/7 (T27, 9 July 2007); T. 7976/4-10, T. 7982/22 to 7983/9 (T37, 10 July 2007) and D293; T. 8081/8-20, T. 8083/21-25 (T56, 11 July 2007); T. 8105/17-24 (T56, 12 July 2007); T. 8140/11-14, T. 8141/12-15 (T38, 12 July 2007); T. 8258/1-7 (T21, 13 July 2007); T. 8343/14-20, T. 8344/24 to 8345/15, T. 8358/19 to 8359/2 (T9, 16 July 2007) and D316; T. 8419/14 to 8420/20, T. 8434/21 to 8435/7 (T6, 17 July 2007) and D318 and D313; T. 8490/2-7, T. 8504/11-16, T. 8505/9-12, T. 8506/15-23, T. 8511/23 to 8512/3, T. 8515/13-17 (T41, 18 July 2007) and D325 and D326; T. 8739/19 to 8740/10, T. 8743/10 to 8744/4 (T12, 24 July 2007); T. 8881/24 to 8882/10 (T25, 26 July 2007); T. 8909/14 to 8910/15, T. 8915/20 to 8916/7 (T57, 26 July 2007).

²⁵⁹ T. 7028/25 to 7031/6, T. 7035/7-19, T. 7036/14-19, T. 7046/24 to 7047/15, T. 7034/15-17, T. 7034/15 to 7035/5, T. 7038/35 to 7039/13, T. 7039/18-25, T. 7041/3-7, T. 7042/3-12, T. 7053/5-20 (T42, 21 June 2007); T. 7849/17-25, T. 7850/12-2, T. 7852/1-25 (T61, 9 July 2007).

101. The Chamber accepts the reports of the Bosnian police, including the list tendered with Vekaz Turković²⁶⁰ and the Tabeau expert report²⁶¹ to establish the status and number of the victims, whereas:

- a. first, the police reports do not demonstrate the cause-effect relationship between the attacks carried out by the SRK and the persons presented as victims or, second, the civilian or military status of the said persons;
- b. the report from the demographics expert fails to distinguish between the victims who fell in the territory held by the SRK and those who fell in that held by the ABiH.²⁶²

102. In paragraph 795 of the Judgement, in assessing the Appellant's allegations made during the trial phase, the Chamber states that it had before it evidence, and especially testimony, including that from UN officials, demonstrating that the ABiH had not shelled its own population. The Chamber finds that there were rumours, mainly from the SRK side, that the ABiH members shelled civilians living between the confrontation lines and staged incidents to gain sympathy from the international community.

103. The Appellant understands that the Chamber considers that all of the deaths or injuries to victims in the ABiH-held part of Sarajevo were caused by shots from the SRK-held part of Sarajevo. The number of victims injured or killed in the attacks carried out by the SRK, and especially the number of civilians, is an indicia among others, which supports the finding as to whether these attacks were directed against the civilian population, and it must be proved beyond a reasonable doubt.

104. The fact that on certain occasions the persons in the ABiH-held part of Sarajevo were injured or killed by ABiH sniper fire and shells creates a reasonable doubt in respect of the Chamber's finding that: "...sniper fire²⁶³ against civilians within the confrontation lines primarily came from SRK-

²⁶⁰ P602.

²⁶¹ P637.

²⁶² T. 5526/9 to 5534/16 (W132, 2 May 2007).

²⁶³ Judgement, para. 794.

*held territory” and that “...shelling against civilians within confrontation lines primarily came from SRK-held territory”.*²⁶⁴

105. Much of the evidence in the trial record demonstrates the fact that on certain occasions persons in the ABiH-held part of Sarajevo were injured and killed by sniper fire and shelling from the ABiH. These were not rumours from SRK members, but rather documents drafted by UN officials or by the President of Bosnia and Herzegovina himself, on the basis of information obtained from the French Ambassador.²⁶⁵
106. The Chamber itself refers to this type of evidence in paragraphs 433 and 437 of the Judgement and in the footnotes.
107. One example could demonstrate that the SRK was portrayed in the media as the party which failed to ensure the safety of the Pope, who was preparing a visit to Sarajevo, when in fact it was the ABiH units who were firing on Zetra stadium, which was supposed to accommodate the Pope and those coming to see him and listen to his address.²⁶⁶
108. The diary of a UN officer posted in Sarajevo in 1995 indicates that the Commander of the Sector Sarajevo, General Bachelet, stated that the ABiH was behind a large number of the incidents.²⁶⁷
109. The ABiH fired on people in the territory it held whenever they attempted to cross the confrontation line to enter SRK-held territory.²⁶⁸
110. The international representatives taking part in the investigations of sniping and shelling incidents in the ABiH-held part of Sarajevo concluded that the sniper fire at the trams or at the people in this part of Sarajevo originated from the ABiH-held territory.²⁶⁹

²⁶⁴ Judgement, para. 796.

²⁶⁵ D179, D51, D527, D66.

²⁶⁶ D180 which shows the part of the BBC television news broadcast, D179 and D51 and T. 5300/25 to 5301/5 (W157).

²⁶⁷ D527.

²⁶⁸ D148, D149, D216, D205.

²⁶⁹ D67, page 17; D66.

111. The witnesses who appeared before the Chamber confirmed the fact that on certain occasions persons in the ABiH-held part of Sarajevo were injured and killed by sniper fire and shelling coming from the ABiH.²⁷⁰ Again, these were not witnesses who belonged to the SRK but rather UN officials.
112. During his testimony, David Harland, the UN official in Sector Sarajevo, confirmed the fact that at times the ABiH shot at people in its own territory, before and during the period material to the Indictment.²⁷¹ Hendrick Nicolai, the UN official in the BiH Command, testified that the UN did not rule out the possibility that the ABiH could shoot at its own population in Sarajevo for the sake of accomplishing the supreme interests of the State, and about the fact that his predecessor, General Van Baal, had concluded on the basis of investigations that the ABiH shot at people in the territory it held.²⁷²
113. It is clear from the evidence that certain incidents that the Prosecution pleaded as examples of attacks that the SRK carried out on civilians, with the intention of terrorizing them, are in fact an example of the fact that people were killed in the ABiH-held territory of Sarajevo by shots originating from this same territory.²⁷³
114. In light of the above-mentioned evidence, a reasonable Chamber could not have concluded beyond a reasonable doubt that there were only rumours, mainly from the SRK side, that the members of the ABiH shelled civilians living between the confrontation lines and staged incidents to gain sympathy from the international community, because international representatives had realized, on the basis of the investigations carried out, that the ABiH itself was behind some of the attacks in the ABiH-held part of Sarajevo.
115. A reasonable Chamber should have concluded that on certain occasions, persons in the ABiH-held part of Sarajevo were injured and killed by sniper fire and shelling from the ABiH, and subsequently assessed this fact along

²⁷⁰ T. 8818/24 to 8819/7 and 8820/22 to 8821/4 (T60).

²⁷¹ T. 398/16 to 399/14; T. 401/21 to 402/16; T. 431/13-25 and T. 432/1-5 (W56, 15 January 2007).

²⁷² T.1039/7-10 and T.1044/19 to 1045/12.

with other indicia to establish whether the attacks carried out by the SRK were directed against civilians.

Cause-effect relationship

116. The Chamber erred in law because it failed to establish beyond a reasonable doubt the cause and effect relationship between the injuries or deaths of persons whom the Prosecution presented as victims of the attacks carried out by the SRK and the said attacks, and consequently committed an error of fact in paragraph 738 of the Judgement. There is abundant evidence to demonstrate the reasonable doubt in respect of this causal link.

The various evidence demonstrates that after the attacks carried out by the SRK,²⁷⁴ several agents became involved to assess the consequences of the said attacks, namely local policemen and those from the Security Services Centre,²⁷⁵ as well as international representatives and volunteers on the ground in Sarajevo.²⁷⁶ They were independent from one another, with the exception of the local policemen whose work was checked by the Security Services Centre policemen.²⁷⁷ The investigating judge was not systematically present when the policemen arrived on site.²⁷⁸

117. The UNMOs described the military activities of the warring parties and their consequences on people, both in their reports and when they were on the ground with the Security Services Centre policemen, and were not part of the investigative team, even if their names were mentioned in the reports established by the Bosnian policemen.²⁷⁹ They were not always authorized by the Bosnian authorities to visit the morgues and hospitals.²⁸⁰ On 22 June 1995, during the ABiH offensive, the BiH Minister of Health informed the UNMOs

²⁷³ For example, paragraphs 184 to 224; 262 to 287 and 290 to 303 of the Brief.

²⁷⁴ Within the meaning of Article 49 of Protocol I.

²⁷⁵ T. 2730/4 to 2731/3 (W128).

²⁷⁶ P267 and the testimony of Mr John Jordan (W152).

²⁷⁷ T. 2730/4-6 (W28).

²⁷⁸ T. 1357/21 to 1358/7 (W138); T. 3708/17-3709/20 (W38); T. 2353/13-23 (W58); T.2521/23 to 2522/4 (W137); T. 1356/21-25; 1357/1-25 and 1358/1-7 (W138).

²⁷⁹ T. 2749/9-22 (W28); T.3746/21 to 3747/1 (W91).

²⁸⁰ For example during the June 1995 ABiH offensive, P892.

that from that point on they were no longer authorized to visit the hospitals but should only investigate the massacres.²⁸¹

UNMOs made no distinction between the consequences of the attacks carried out by the SRK and the consequences of the military activities of other units of the VRS or ABiH.²⁸² The UNMOs stated in their reports that they only reported the information on the victims that they received from the Bosnian authorities.²⁸³

In one report the Bosnian policemen stated that UNPROFOR had cleaned up the scene of an incident prior to their arrival.²⁸⁴ At times the Bosnian policemen prohibited international representatives from conducting investigations into incidents²⁸⁵ or they sequestered the UNMOs during the real investigations, pretending to conduct an investigation the next day even though everything had already been done without the UNMOs.²⁸⁶ The UNMOs testified about the sometimes aggressive or threatening behaviour of the ABiH Army liaison officers.²⁸⁷ There was also testimony on real incidents between the Bosnian police and members of UNPROFOR.²⁸⁸ Some Bosnian policemen considered that the UNMOs were not sufficiently qualified to conduct investigations.²⁸⁹

Members of NGOs also intervened on the sites because they were not happy with the work of the police.²⁹⁰

The local police who were closest to the scene of the incident were the first to intervene on the site and their work was verified by the police from the

²⁸¹ P893, page 2 of Annex A, under B.

²⁸² T. 4144/9-11 (W70); D64, D65, D66, D99, D146, D148, D149, D216, D205, D306; D100.

²⁸³ For example P897, page 9.

²⁸⁴ D19 and T. 2674/19 to 2675/20 (W152).

²⁸⁵ P387, question 1 under "Shelling".

²⁸⁶ T. 4582/12-16, 4583/4-9 and 4583/10-17 (W57), but the UNMO states the contrary T.662/19-20, 670/22-25, 671/11-25 (W101); during certain periods the UNMOs were prohibited from going out: P584 page 4 para. 2 and T. 4798/7-12 and 4799/5-9 (W40).

²⁸⁷ For example P345 para. 16; P 519.

²⁸⁸ D126, page 1, last three paragraphs, but the reason for the anger of Witness W91 is not clear since we know that the scene of the incident was not intact when the Security Services Centre police got there.

²⁸⁹ T. 2509/6 (W137).

²⁹⁰ T. 2672/25 to 2673/10 (W152).

Security Services Centre.²⁹¹ The Security Services Centre policemen practically could not know whether the site had been protected or not and they noted everything they found at the site in their report.²⁹² No report whatsoever was ever tendered into evidence from these local police who were supposed to clear the dead and evacuate the wounded before the arrival of the Security Services Centre police. Citing concern for public opinion which could have expressed outrage at the scenes of massacres (which is an absolutely unacceptable argument from the Appellant's viewpoint), Witness W137 explained to the Chamber the reasons why the scenes of different incidents had been cleaned up and the bodies of the alleged victims removed before the forensic police started their investigations.²⁹³ Such concern on the part of the Bosnian police does not seem sincere since it is known that severed body parts remained on the site and were shown on television.²⁹⁴

118. /Redacted/.²⁹⁵ /Redacted/.²⁹⁶

119. Although it sometimes happened that investigation teams from the Security Services Centre reached the site several minutes after the incident, when the scene was still intact, they did not take photographs of alleged victims on the site or of traces of blood, let alone establish any sort of medical documents.²⁹⁷

120. The photographs of alleged victims were never taken on the spot where they were found after the incident.²⁹⁸ The police may have photographed traces of blood²⁹⁹ but never took samples of biological material.³⁰⁰ Consequently, the reports contain information which, rather than being determined using

²⁹¹ T. 2730/4 to 2731/3 and 2730/4-6 (W28).

²⁹² T. 2731/7-14 (W28, 22 February 2007); T. 3770/19-25 (W91).

²⁹³ T. 2499/24 to 2504/15 (W137).

²⁹⁴ T. 2556/8 to 2557/22 (W137).

²⁹⁵ T. 2732/21 to 2733/5 and T. 2734/7 (W28); T. 3775/16-17 (W91).

²⁹⁶ T. 2763/20 to 2764/19 (W28).

²⁹⁷ P236 and T. 2360/25 to 2370/1 (W58).

²⁹⁸ This is also confirmed by policeman W116 : T. 4656/15-23

²⁹⁹ T. 1309/25 to 1311/16; T. 1384/16 to 1385/7 and T. 1389/22 to 1392/5 (W138); P121 to P125 are the documents related to this investigation; T. 1374/9-17 (W138) 5224/6-16; 5225/2-11; 5178/21-24; 5225/22 to 5226/18 (W136); T. 4757/22 to 4758/6 (W114).

³⁰⁰ See the Security Services Centre reports to ascertain that this investigative measure was lacking.

scientific methods, is based on /Redacted/,³⁰¹ and when it is put under the scrutiny of cross-examination it proves to be inaccurate.³⁰²

121. Medical reports were never of interest to the Bosnian police investigators.³⁰³

122. In paragraphs 187 and 189 the Chamber finds that the reports from the Bosnian police are admissible as evidence of a causal link between the particular incidents and the persons who were presented as victims of those incidents. The Chamber seems to have accepted these reports because they are similar to those established by the Serbian police. This, however, is not the case.³⁰⁴ However, in no case may the potential deficiencies in the reports of the Serbian police remedy the deficiencies in the Bosnian reports, on the basis of which it is impossible to find that there is a causal link between the specific incident and the persons presented as being victims of the said incident. The Chamber rightly refers to the testimony of expert witness Milošavljević,³⁰⁵ concerning the external examination of victims, which may serve as evidence of the aforementioned causal link, however, the reports of the Bosnian police never contain information about external examinations, carried out in accordance with the scientific method described by Milošavljević. The reports established by the forensic experts, which are contained in the reports of the Bosnian police, only prove the death of a person. /Redacted/.³⁰⁶ Knowing the exact location of the injury proves particularly important since the territory of Sarajevo was the theatre of permanent combat between the warring parties.

Status of the victims

123. The Chamber erred in law because it failed to establish beyond a reasonable doubt, in accordance with the law applicable before it, the civilian status of

³⁰¹ D369 and T. 9237/22 to 9244/6 (T29, 24 August 2007).

³⁰² Comparer P378 page ERN 00269060 para. 4; T. 3776/7-23 (W91) and T. 2797/3-7 (W94).

³⁰³ T. 2352/19 to 2353/12 (W58).

³⁰⁴ T. 8065/12 to 8070/3 (T56, 11 July 2007).

³⁰⁵ Footnote 681 of the Judgement.

³⁰⁶ P405, P406, P407, P409, as an example.

the persons presented by the Prosecution as victims of the attacks carried out by the SRK.³⁰⁷

124. The Appellant considers that there is abundant evidence to create a reasonable doubt as to the status of the victims, as follows.

125. UNMOs said in their reports that they only reported the information on the victims that they received from the Bosnian authorities, including the military status of the victims, without having any possibility of verifying it, which was noted in the reports (UNMO NOT CONFIRMED).³⁰⁸ In order to determine the civilian or military status of the victims, in its reports UNPROFOR used information provided by the ABiH,³⁰⁹ one of the two parties to the conflict and, as a result, a party with an interest in presenting the victims as civilians.

126. Uniformed combatants were mixed with non-combatants.³¹⁰ While moving between the trenches the members of the BiH Armed Forces did not wear uniforms.³¹¹ All men, even young boys in ABiH-held territory, carried weapons with which they fired.³¹² Women were part of the BiH Armed Forces and were even incorporated into its combat units in large numbers.³¹³ Witness W137 stated before the Chamber that at the time he was a member of the ABiH he did not wear a uniform.³¹⁴ Witness T31 met people not in uniform but bearing arms.³¹⁵

127. A policemen explained his method for determining an individual's military status for the purposes of his report.³¹⁶

128. As regards the specific incidents, neither the cause-effect relationship between the injuries or the death of persons presented by the Prosecution as

³⁰⁷ Paragraphs 27 to 32 of the Brief – Concept of the civilian population.

³⁰⁸ For example P897, page 9.

³⁰⁹ P334, para. 54 (W124).

³¹⁰ T. 1414/15-18 (W138).

³¹¹ T. 4802/25 to 4803/16 (W40); similarly T. 920/7-9 and T. 923/16-21 (W62).

³¹² T. 1001/20 to 1002/4 (W98).

³¹³ D384 to D390, under the heading "Gender".

³¹⁴ T. 2478/13-23 (W137).

³¹⁵ T. 6674/21 to 6675/1 (T31).

³¹⁶ T. 4657/3 to 4658/2 (W116).

victims, nor their civilian status, have been established beyond a reasonable doubt:

- in paragraph 250 the Chamber finds that Jasmina Tabaković was a civilian person, although there is no evidence to substantiate this;
- in paragraph 266 the Chamber finds that Alma Cutina was a civilian person, although there is no evidence to substantiate this;
- in paragraph 276 the Chamber finds that Hajrudin Hamidić was a civilian person, since he was the tram driver, although there is no evidence to substantiate this;
- in paragraph 289 the Chamber finds that Sabina Šabanić and Afeza Karačić were civilian persons, although there is no evidence to substantiate this;
- in paragraph 308 the Chamber finds that Alija Holjan and Alma Mulaosmanović were civilians, although there is no evidence to substantiate this;
- in paragraph 322 the Chamber finds that Azem Agović and Alen Gičević were civilians and that they were injured as passengers in the tram, although there is no evidence to substantiate this;
- in paragraph 378 the Chamber finds that Tarik Žunić was a civilian person, although there is no evidence to substantiate this;
- in paragraph 393 the Chamber finds that Adnan Kasapović was a civilian person, although there is no evidence to substantiate this;
- in paragraphs 443, 493, 507, 620, 532, 538, 551, 560, 619, 639, 651 and 668 of the Judgement, the Chamber makes findings as to the number³¹⁷ and civilians status of the victims, with no evidence to substantiate these facts, even though the burden of proof was on the Prosecution;
- in paragraph 630 the Chamber accepts as proved the opinion of Witness W102, as regards the cause of death of her husband, even though she was a factual witness;
- in paragraph 721, the Chamber finds that during the incident of 28 August 1994, one single victim was a soldier, although the civilian status of other persons has not been substantiated by the evidence

³¹⁷ In total 12 dead and 75 wounded, most not seriously.

in the record. The evidence of Drs Nakaš and Mandilović concerning the civilian or military status of the victims³¹⁸ is not sufficient, if one takes into account the combatants not wearing uniforms systematically.³¹⁹ The fact that the victims of the explosion may have had other injuries besides those caused by shrapnel does not explain the fact that one person presented as a victim of the said incident bore injuries from bullets and the other from a hunting rifle.³²⁰ After the said incident, caused, according to the Chamber's conclusions (which are disputed by the Appellant), by one single shell, there were 35 dead and 78 injured, which seems completely impossible,³²¹ especially when the said number is compared with the total number of alleged victims in the 12 incidents involving aerial bombs, which release between 7 and 20,000 fragments upon exploding.³²²

(V) The discriminatory nature of the attacks carried out by the SRK

129. The indicia to support a finding as to whether attacks are discriminate or indiscriminate in nature are determined in the *Galić* Appeal Judgement.³²³ The Appellant considers that all of the attacks carried out by the SRK, within the meaning of Article 49 of Protocol I, under his command were combat activities within military installations, as demonstrated by the above-mentioned evidence,³²⁴ and that the Chamber failed to establish beyond a reasonable doubt that the potential victims of those attacks were civilians. Consequently, it failed to establish that the attacks carried out by the SRK were indiscriminate.

³¹⁸ Paragraph 675 of the Judgement.

³¹⁹ Paragraph 125 of the Brief.

³²⁰ D370, D371 and D372 and T. 9255/6 to 9271/22 (T29, 27 August 2007).

³²¹ T. 9223/7 to 9228/13 (T18, 24 August 2007).

³²² T. 4820/19 to 4822/15 (W15, 20 April 2007).

³²³ *Galić* Appeal Judgement, para. 133.

³²⁴ See paragraphs 42 to 99 of the Brief.

Mental element of the crime of terror

130. To find the Appellant guilty of the crime of terror, the Chamber had to establish beyond a reasonable doubt,³²⁵ first, his intention to attack civilians³²⁶ and then his specific intent to spread terror among those civilians,³²⁷ mindful that: *“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.”*³²⁸

131. In cases where the unlawful attacks have several purposes, the intention to spread terror must be the primary purpose.³²⁹

132. Indicia from which the specific intent to spread terror may be inferred include the following:

- the nature of the civilian activities targeted;
- the manner in which the attacks on civilians were carried out and the timing and duration of the attacks on civilians.³³⁰

An example of attacks from which the intention to spread terror among civilians may be inferred would be attacks which had no discernible significance in military terms.³³¹

133. Contrary to the Chamber’s conclusion in paragraph 759 of the Judgement, the evidence shows that all of the SRK military activities were justified in

³²⁵ After establishing, beyond a reasonable doubt, the *actus reus* of the said crime, which the Appellant disputes - paragraphs 15 to 128 of the Brief.

³²⁶ Within the meaning of paragraph 54 of the *Galić* Trial Judgement, confirmed by the Appeals Chamber in the *Galić* Appeal Judgement, paragraph 140.

³²⁷ *Galić* Appeal Judgement, paragraphs 103 and 104.

³²⁸ *Galić* Appeal Judgement, paragraph 103, citation taken from *Travaux préparatoires*, Vol. XV, page 282.

³²⁹ *Galić* Appeal Judgement, paragraph 104.

³³⁰ *Galić* Appeal Judgement, paragraphs 104 and 107, referring to paragraphs 592 and 593 of the *Galić* Trial Judgement.

³³¹ *Galić* Trial Judgement, paragraph 593.

military terms, considering that the ABiH 1st Corps units fought persistently against the SRK units.³³²

134. The Chamber erred in law by failing to clearly set out the indicia permitting an assessment of whether the purpose of an attack directed against civilians was to spread terror among them, and by failing to determine beyond a reasonable doubt that the primary purpose of the attacks, which it had previously demonstrated were carried out by the SRK and directed against civilians, was to spread terror.³³³

135. In paragraphs 870 to 888 and 905 to 913, the Chamber, in muddled fashion, sets out the constituent elements of the crime of terror and assesses the evidence related to them.

136. Even if the Chamber rightly held that the actual spreading of terror is not a required element for the crime of terror to be constituted,³³⁴ it erred in law by stating as follows:

*“The fact that civilian population suffered and experienced terror during an armed conflict may however serve as corroboration of the intent to terrorise.”*³³⁵

This allegation from the Chamber runs directly contrary to the rules established by the jurisprudence of the Appeals Chamber which adopts the position expressed in the aforementioned *Travaux préparatoires*.³³⁶ Indeed, the terror that actually affected the population must remain neutral in respect of the constitution of the crime of terror. The crime of terror may be constituted without the terror actually being widespread and *vice versa*, that is the terror may actually be widespread without the crime of terror being constituted. What is important is the material element of the offence and the

³³² Paragraphs 36 to 99 of the Brief and the evidence cited. T. 6018/24 to 6019/14 (T28, 1 June 2007) and D200; T. 5740/24 to 5743/5 (T62, 29 May 2007); T. 6506/17 to 6507/4 (T36, 11 June 2007); T. 6047/12 to 6048/4 (T28, 1 June 2007); T. 6183/15-19 (T49, 5 June 2007); T.7060/25 to 7061/21 (T14, 22 June 2007); T. 7034/15 to 7035/5 (T42, 21 June 2007); T. 7383/13 to 7384/19 (T54, 27 June 2007); T. 8258/1-7 (T21, 13 July 2007); T. 8419/14 to 8420/20 (T6, 17 July 2007).

³³³ It seems to the Appellant that the Chamber assessed the evidence concerning the specific intent to spread terror in paragraphs 905 to 913 of the Judgement, even though this is not very clear, because the heading is “Terror”.

³³⁴ Paragraph 880 of the Judgement and footnote 3030.

³³⁵ Paragraph 880 of the Judgement.

intent to attack the civilians with the primary purpose of spreading terror among them, all which must be established beyond a reasonable doubt.

Making the terror actually experienced by people living in the ABiH-held part of Sarajevo into an indicia to support the inference of the intent to spread terror is an error of law, because it runs counter to the rules governing the crime of terror.

Even if the Chamber were to establish beyond a reasonable doubt that these people were overcome by extreme fear,³³⁷ it may not, as it has done, escape its obligation to establish beyond a reasonable doubt in particular the Appellant's intent to spread terror, using the indicia established in the *Galić* jurisprudence.³³⁸

137. The Chamber errs in law by indicating that an indiscriminate attack may be taken as indicia of the intent to spread terror.³³⁹ The indiscriminate nature of an attack indeed serves as the indicia supporting the inference of one of the elements of the *actus reus* of the crime of terror³⁴⁰ and may not further serve as indicia of the mental element of that crime.

138. As regards the attacks during the cease-fire or long-term attacks on civilians, or attacks during the siege of a city as indicia of the intent to spread terror,³⁴¹ the Appellant shares the Chamber's position, however, the fact remains that the Chamber had to establish beyond a reasonable doubt the above-mentioned indicia, before inferring such intent, which it failed to do, thereby also committing an error of law.³⁴²

139. In paragraph 138, the Chamber wrongly concluded that most of the hills surrounding Sarajevo were controlled by the SRK. The contrary can be seen

³³⁶ Paragraph 129 of the Brief.

³³⁷ As described by the Prosecution in its closing arguments, after being asked by the Chamber, paragraph 885 of the Judgement.

³³⁸ Set out, appropriately, by the Chamber, in the first sentence of paragraph 881 of the Judgement.

³³⁹ Paragraph 881 of the Judgement.

³⁴⁰ Paragraph 33 of the Brief.

³⁴¹ Paragraph 881 of the Judgement.

³⁴² The Appellant noted an error of fact committed by the Chamber, its finding in paragraph 751 of the Judgement, holding that Sarajevo was under siege.

from paragraphs 111 to 136 of the Judgement.³⁴³ Indeed, Trebević was divided between the two parties and the city centre was not visible from the Serbian positions.³⁴⁴ The highest mountain, Igman, was held by the ABiH units, while the SRK-held parts of Sarajevo including Grbavica, Nedžarići, Vogošća, Rajlovac, Ilidža, Nedžarići, Lukavica, Hadžići and Ilijaš, were under the military domination of the ABiH 1st Corps units positioned either in the natural high ground such as Mojmiro, Briješko Brdo, Žuč, Hum, Grdonj and Igman, or in the towers in Alipašino Polje, Vojničko Polje, Marin Dvor and Hrasno.³⁴⁵

140. Consequently, the conclusions drawn by the Chamber in paragraphs 139 and 751 are not the only conclusions reasonably possible and may not be taken into account to form the basis of the Appellant's guilt.³⁴⁶ The conclusion that the two warring parties dominated one another in the different parts of Sarajevo is also reasonably possible and it must be taken into account since it militates against the Appellant's guilt.

³⁴³ See also paragraphs 51 to 77 of the Brief and T. 6169/23 to 6172/19 (T49, 5 June 2007) and D207; T. 6496/13-17 and T. 6496/23-24 (T36, 11 June 2007).

³⁴⁴ T. 6188/18 to 6189/18 (T49, 5 June 2007) and D208.

³⁴⁵ Paragraphs 51 to 78 of the Brief and more specifically: T. 8866/22 to 8867/7, T. 8868/2-3 and T. 8867/16-19 (T25, 26 July 2007); T. 6614/10-17 (T47, 13 June 2007); T. 7532/8-13 (T13, 3 July 2007); T. 7422/6-9 and T. 7422/10 to 7425/16 (T52, 28 June 2007) and D278; T. 7430/25 to 7433/12 (T52, 28 June 2007) and D278; T. 7557/20-25 (T34, 3 July 2007); T. 7628/25 to 7629/7, T. 7630/12-13 (T22, 4 July 2007) and D283; T. 7899/5-15 (T27, 9 July 2007); T. 7969/19 to 7971/12 (T37, 9 July 2007) and D292; T. 6915/8-15 and T. 6916/4-15 (T2, 20 June 2007) and D249; T. 6993/9 to 6994/9 and T. 6994/24 to 6995/8 (T39, 21 June 2007) and D254; T. 7034/15-17, T. 7035/7-19, T. 7036/14-19, T. 7046/24 to 7047/15, T. 7051/23 to 7052/18 and T. 7053/13-20 (T42, 21 June 2007); T. 7057/25 to 7059/22 and T. 7060/8-11 (T14, 22 June 2007) and D255 and T. 7077/14-16 and T. 7077/25 to 7082/17 and T. 7082/24 to 7083/13 (T14, 22 June 2007) and P631; T. 7091/21-23 and T. 7094/5 to 7095/3 (T14, 22 June 2007) and D257 and D258; T. 7131/21 to 7133/6, T. 7135/18 to 7136/11, T. 7169/23 to 7170/4, T. 7171/6-12, T. 7202/5-24, T. 7202/20 to 7204/20 (T48, 22 June 2007) and D260, D261 and D262; T. 7299/22 to 7302/4, T. 7304/21 to 7305/17, T. 7306/24 to 7307/10 (T55, 26 June 2007); T. 6871/8-23, T. 6892/5-7, T. 6895/21-24 (T8, 19 June 2007); T. 6801/14-17, T. 6801/22 to 6802/4, T. 6802/20-22, T. 6803/3 to 6807/1, T. 6807/7-16, T. 6808/17-20, T. 6840/14 to 6842/6 (T7, 18 June 2007) and D239, D241; T. 8251/5-14, T. 8253/22 to 8254/24, T. 8255/6-9, T. 8255/25 to 8256/3, T. 8259/1-13, T. 8263/25 to 8264/8, T. 8268/23 to 8269/1, T. 8273/22 to 8274/3, T. 8282/5-15 (T21, 13 July 2007) and P818; T. 8299/23 to 8301/7, T. 8302/1 to 8309/3 (T15, 13 July 2007) and D312.

³⁴⁶ *Čelebići Appeal Judgement*, paragraph 458.

Nexus - the sine qua non of crimes against humanity

141. In paragraphs 918 and 919 the Chamber correctly sets out the applicable law. However, it errs in law, which leads it to err in fact, by drawing the conclusion contained in paragraph 920.

142. Indeed, to find that the requisite *nexus* existed, the Chamber had to establish beyond a reasonable doubt only the fact that the attacks carried out by the Appellant were directed against civilians, which it failed to do.³⁴⁷

Material and mental elements of the underlying crimes

Murder

143. The Chamber describes the crime of murder in paragraphs 931 and 932 of the Judgement.

144. In order for the *actus reus* of the said crime to be constituted, there must be a showing of the death of the victim of an attack, and of the cause-effect relationship between the attack and the death.³⁴⁸ The Chamber erred in law by failing to establish beyond a reasonable doubt one of the constituent elements of the crime of murder, namely the causal link between the deceased persons³⁴⁹ and the attacks carried out by the SRK, described as specific incidents.³⁵⁰

Inhumane Acts

145. In paragraphs 933 to 938 of the Judgement the Chamber describes the crime of inhumane acts. In paragraph 934 of the Judgement, it correctly cites the constituent elements of the crime, but errs in law by failing to establish beyond a reasonable doubt the said elements, specifically the causal link between the persons seriously injured, both physically and psychologically,

³⁴⁷ See paragraphs 33 to 128 of the Brief.

³⁴⁸ *Galić* Appeal Judgement, paragraphs 147 to 149.

³⁴⁹ P602 and P637.

and the attacks carried out by the SRK, described as specific incidents,³⁵¹ as well as the SRK's intent to cause the said injuries by carrying out the attacks, within the meaning of Article 49 of Protocol I.

2nd GROUND OF APPEAL

The Chamber violated Rule 89 of the Rules of Procedure and Evidence by establishing certain facts using evidence that it had not admitted during the proceedings.³⁵²

146. The Chamber established the visibility of certain sniping incidents and cited as the source of information Exhibit D362, although this evidence contains no information on visibility.³⁵³ In fact, this information came from the Prosecution and yet it is not part of the evidence.³⁵⁴
147. In paragraph 751 of the Judgement, the Chamber establishes the fact that the goal of the siege of Sarajevo was to compel the BiH Government to capitulate, although none of the evidence proves this fact.
148. In paragraphs 910, 993 and 1001 of the Judgement, the Chamber gives its own testimony about the psychological consequences of military activities on the civilian population.
149. The above facts must not be taken into consideration by the Appeals Chamber.

3rd GROUND OF APPEAL

Throughout the Judgement under appeal, the Chamber violated the legal standards governing the procedure of establishing the facts, in particular by failing to consider all of the evidence it admitted during the trial as a whole.

³⁵⁰ Paragraphs 170 to 317 of the Brief.

³⁵¹ Paragraphs 170 to 317 of the Brief.

³⁵² By way of example, although the list is not exhaustive: paragraphs 265, 323, 396, 751, 910, 993, 1001 of the Judgement under appeal.

³⁵³ Paragraphs 265, 323 and 396 of the Judgement.

³⁵⁴ T. 9064/3 to 9067/16 (22 August 2008).

150. The Chamber ignored almost completely evidence showing the military activity of the ABiH, but the Appellant drew the Appeals Chamber's attention to this in his Brief.³⁵⁵

4th GROUND OF APPEAL

In the Judgement, the Chamber erroneously sets out and applies legal norms governing specific points of law:

1st sub-ground: the question of whether the presence of soldiers in a civilian objective changes its civilian status

151. In paragraph 224 of the Judgement, the Chamber peremptorily finds that the presence of several soldiers in a tram does not change its status as a civilian objective. Indeed, according to the rules of law contained in Protocol I and the Commentary, a civilian objective may, owing to its specific purpose, become a military objective. The duty of the Chamber is to apply these rules to the facts and find whether, in a specific situation, the status of objective has changed. Taking the example of the tram, the presence of one single soldier could change its civilian status to a military status, if the tram is being used for military purposes.

152. The Appeals Chamber should not accept the qualification of the tram as a civilian objective made *in abstracto* by the Chamber, in spite of the fact that it was transporting soldiers.

2nd sub-ground: the question of whether armed forces retain their military status if they are outside of combat

153. The Chamber committed an error of law in paragraphs 365 and 366 of the Judgement by qualifying Derviša Selmanović as a civilian and in paragraph 676 with regard to the Markale victims.³⁵⁶ The Appeals Chamber should not accept the status of these persons as civilians.

3rd sub-ground: the question of what, in the legal sense, is a state of "siege" and what are its legal effects

³⁵⁵ Paragraphs 42 to 99 of the Brief.

³⁵⁶ Paragraphs 28 and 29 of the Brief.

154. Paragraph 751 of the Judgement sets out a rather contradictory definition of “siege” and finds that Sarajevo was under siege. Nevertheless, the Chamber does not cite the legal source of this definition or any possible legal consequences of the state of siege. The Chamber does not show the application of the law to the facts which precedes its factual finding that Sarajevo was under siege by the SRK.

4th sub-ground: the question of whether the absolute impossibility of acting is likely to exonerate an agent from his criminal responsibility³⁵⁷ and what duration of the impossibility to act would be likely to exonerate an agent from his criminal responsibility.³⁵⁸

155. In paragraphs 975 and 976 of the Judgement, the Chamber defeats the general principle of criminal law providing that the total inability to act exempts a person from criminal responsibility. It seems to set forth a rule of law in which this impossibility should last a certain period of time in order to be able to exonerate a person from criminal responsibility, but this is not the case.

156. The evidence³⁵⁹ establishes beyond a reasonable doubt that the Appellant was completely unable to act from 6 August to 10 September 1995, which means that his criminal responsibility pursuant to Article 7 (1) of the ICTY Statute did not exist during this period.

157. Consequently, the Appeals Chamber should not take into consideration the SRK attacks³⁶⁰ in the period from 6 August to 10 September when assessing the culpability of the Appellant.

5th GROUND OF APPEAL

When determining the sentence to impose upon the Accused, the Chamber violated Article 24 of the ICTY Statute by considering the constitutive element of an offence to be an aggravating factor of the same offence.

³⁵⁷ Paragraph 975 of the Judgement.

³⁵⁸ Paragraph 976 of the Judgement

³⁵⁹ Paragraphs 827 to 832 of the Judgement and the cited evidence. P344, page 6, under (e).

³⁶⁰ Within the meaning of Article 49 of Protocol I.

158. In paragraphs 999, 1000 and 1001 of the Judgement, the Chamber commits an error of law by taking the constitutive elements *sine qua non* of the crimes for which the Appellant is convicted as aggravating circumstances. The violation of humanitarian law, attacks against civilians or the indiscriminate use of weapons are to be established in order to ascertain the Appellant's guilt, and counting them once more as aggravating circumstances constitutes an error of law, which the Appeals Chamber should correct.

PART II

ERRORS OF FACT

159. In its Judgement, the Chamber enumerates the evidence that it found pertinent in the section entitled *Evidence*³⁶¹ and then evaluates it in the section entitled *Findings on the Counts and Criminal Liability of the Accused*.³⁶²

160. In the section entitled *Evidence*, however, the Chamber evaluates evidence concerning in particular the possession of aerial bombs,³⁶³ the military positions of the conflicting parties;³⁶⁴ the validity of Bosnian police reports that contained relevant facts to evaluate the constitutive elements of the crimes for which the Appellant was convicted;³⁶⁵ and specific sniping and shelling incidents in order to determine the origin of fire and to determine the civilian status of victims and certain zones of the part of Sarajevo controlled by the ABiH.³⁶⁶ Finally, under *General Findings on Sniping and Shelling*, which is also part of *Evidence Pertaining to the Campaign in the Indictment Period*, it seems that the Chamber adjudicated on indicia allowing it to conclude whether SRK attacks were directed against civilians.

³⁶¹ Paragraphs 10 to 867 of the Judgement.

³⁶² Paragraphs 868 to 1005 of the Judgement.

³⁶³ Paragraphs 107 and 108 of the Judgement.

³⁶⁴ Paragraphs 138 to 140 of the Judgement.

³⁶⁵ Paragraphs 187, 189 and 190 of the Judgement.

³⁶⁶ Paragraphs 223, 250, 265, 266, 276, 288, 289, 306, 307, 308, 309, 310, 322, 323, 324, 339, 340, 341, 342, 354, 364, 378, 379, 393, 394, 395, 396, 397, 443, 462, 463, 464, 465, 473, 474, 480, 492, 493, 494, 495, 507, 508, 519, 520, 521, 531, 532, 533, 538, 539, 540, 551, 552, 553, 560, 561, 562, 618, 619, 620, 621, 622, 623, 639, 640, 650, 651, 652, 668, 669, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 738, 751, 759, 794, 795, 796, 797 and 798 of the Judgement.

161. The Appellant had trouble following the Chamber's reasoning since it did not present in an intelligible order its conclusions on all the indicia making it possible to decide on the existence of constitutive elements of the crime of terror and the crimes against humanity charged against the Appellant, both material and mental.
162. And yet, according to the case-law of the ICTY and ICTR Appeals Chamber, the standard for establishing proof "beyond a reasonable doubt", based on the principle of the presumption of innocence, applies not only to the phase when the Trial Chamber makes its ultimate decision on guilt, but also to the phase of establishing the facts that are the basis for the accused's conviction.³⁶⁷ In other words, the Prosecution must prove beyond a reasonable doubt all the facts representing elements of the crimes charged against the accused, not only *in abstracto*, but also as elements that are indispensable for entering a conviction in view of how the Prosecution has pleaded its case.³⁶⁸
163. In the part dealing with errors of law, the Appellant presented his grounds concerning the constitutive elements of the crimes for which he was convicted by the Chamber, which must all be proven beyond a reasonable doubt.³⁶⁹ He also raised certain errors of fact within the context of the constitutive elements of the crime of terror and crimes against humanity.³⁷⁰
164. In the second part of the Brief dealing with errors of fact, the Appellant will analyse the errors of fact concerning the factual findings by the Chamber on the civilian status of certain zones in Sarajevo under ABiH control and on the origin of sniper fire or shelling from SRK-held territory.
165. Given that the Chamber established the Appellant's intention to terrorise the civilian population by means of sniper incidents from SRK-held territory resulting in death or serious injury, as well as using mortars, as an accurate weapon, and modified aerial bombs, as an inaccurate weapon,³⁷¹

³⁶⁷ *Ntagerura* Appeal Judgement, para. 175.

³⁶⁸ *Halilović* Appeal Judgement, para. 130 and footnote 350 *in fine*.

³⁶⁹ Paragraphs 6 to 144 of the Brief.

³⁷⁰ Factual conclusions made by the Chamber in paragraphs 138, 139, 140, 187, 189, 190, 738, 751 and 759 of the Judgement.

³⁷¹ Paragraphs 911, 912 and 913 of the Judgement.

originating in SRK-held territory, an error on the finding of the origin of this fire is an error that could occasion a miscarriage of justice.

166. The presence of military objectives in zones where the incidents took place is important for the finding that civilians were deliberately targeted, if it is possible to find beyond a reasonable doubt that a shot was fired from SRK-held territory.

6th GROUND OF APPEAL

No reasonable Chamber would find that the zones of Vojničko Polje, Dobrinja, Sedrenik and Hrasnica were civilian zones from the period between 10 August 1994 and 11 November 1995 (paragraphs 342, 379, 480, 896, 897, 898, 899, 900, 901, 902 and 903 of the Judgement).

167. After having committed an error of law,³⁷² the Chamber reached a finding on the civilian status of these zones. Nevertheless, it ensues from the evidence that each of these zones contained military objectives, i.e. ABiH troops and goods that by their nature or location or by the purpose given them by the ABiH, contributed to the ABiH's military activity against the SRK.³⁷³ The 104th and 105th brigades of the ABiH 1st Corps had their combat positions in these zones³⁷⁴ and acted continuously against SRK units, so the SRK's military activities were perfectly legal.
168. The specific incidents presented by the Prosecution as examples of the campaign of sniping and shelling attacks by the SRK took place primarily in these zones and in Marin Dvor.
169. The Appellant, while challenging whether in these particular incidents the Chamber has established beyond a reasonable doubt that the shots were fired by SRK members, also challenges the civilian status, in particular of the zones of Vojničko Polje, Alipašino Polje, Dobrinja, Hrasnica, Sedrenik and Marin Dvor.

7th GROUND OF APPEAL

³⁷² Paragraphs 27 to 32 of the Brief.

³⁷³ Paragraphs 50 to 81 of the Brief.

³⁷⁴ P194.

No reasonable Chamber would find that SRK members were behind specific sniper fire:

170. Before analysing the factual conclusions of the Chamber within the scope of the present ground of appeal, divided into five sub-grounds, the Appellant would draw the Appeals Chamber's attention to evidence presenting factors that are likely to create reasonable doubt as to the origin of the sniper fire:

- in certain neighbourhoods, such as Dobrinja, divided between two warring parties, the confrontation lines went between the buildings and the combatants of both camps were so close that it was impossible to know the origin of the projectile;³⁷⁵
- likewise, snipers often changed position and shot to neutralise each other;³⁷⁶
- rumours were rife about the existence of certain positions where shots were fired and the police simply put these locations in their reports without actually investigating the origin of the fire;³⁷⁷
- /Redacted/³⁷⁸ and bullets could easily ricochet in an urban environment;³⁷⁹
- international representatives also noted cases where ABiH combatants shot at individuals on their own territory to create panic, which resulted in protests to the Bosnian authorities;³⁸⁰
- it was difficult to determine the direction from which a person was being fired on;³⁸¹
- the Bosnian police paid no attention to old damage to buildings when they made their on-site reports.³⁸²

³⁷⁵ T. 3228/3 to 3229/8 (W53); 1793/2-3 (W42).

³⁷⁶ T. 1411/1 to 1413/16 (W138); T. 335/18-20 and T. 397/11-13 (W 56).

³⁷⁷ For example, T. 1603/5-8 (W119); compare with T. 349/24 to 350/22 (W56).

³⁷⁸ P207, page 3; T. 1411/1-22 and T. 1414/14 (W138) and P150; T. 1876/4-6 (W42).

³⁷⁹ T. 1866/14-16 and D48 (W42).

³⁸⁰ T. 399/9 to 400/7 and T. 401/2 to 402/16 (W56).

³⁸¹ T. 396/25 to 397/13 (W56, 15 January 2007).

1st sub-ground: the incident on 14 May 1995 (paragraph 250 of the Judgement)

171. The Chamber found that the victim was killed by a bullet fired by a member of the SRK from SRK-held territory in Dobrinja. The Appellant considers, in view of the military situation in Dobrinja described in paragraph 66 of the Brief and the indicia set out in paragraph 170, that in order for the Chamber to be able to find beyond a reasonable doubt on the origin of the shot that killed Jasmina Tabaković, it had to prove the following:

- the victim's location at the time of impact;
- the victim's position at the time of impact with respect to possible sources of fire;
- the place where the bullet entered the victim's body (entry wound);
- the place where the bullet might have left the victim's body (exit wound),³⁸³

172. The Prosecutor, however, presented no proof regarding Jasmina Tabaković's position when she was hit by the bullet.

173. The Bosnian police report³⁸⁴ mentions that Jasmina Tabaković's father found her body in the hallway by the bedroom door. This fact might have been used as indicia to determine where the victim was when she was hit, if there had been other indicia. But no other indicia were proved beyond a reasonable doubt by the Prosecutor.

2nd sub-ground: tramway incidents (paragraphs 223, 265, 266, 276, 288, 289, 306, 307, 308, 309, 310, 322, 323 and 324 of the Judgement)

174. The Chamber found that the trams that were targeted in Sarajevo had a civilian status, since a tram is not suitable for military use and it was well-known in Sarajevo that civilians used them. The Chamber furthermore said

³⁸² T. 4653/20 to 4654/3 and T. 4654/10-12 (W116).

³⁸³ D360, expert report by Ivan Stamenov, Section *Analysis of sniper attacks*, page 13.

³⁸⁴ P796.

that the fact that one or two soldiers were on board a tram did not change its civilian status.³⁸⁵

175. Even if the Appellant can acknowledge the opinion expressed *in abstracto* by the ballistics expert Van der Weijden that trams are ill-suited for military use, it is another matter as to whether the presence of soldiers on board tramways might change their civilian status in specific situations.³⁸⁶
176. Likewise, the Appellant considers that the Chamber committed an error of law by not according any importance to the fact that during the period covered by the Indictment, trams were running very close to the confrontation line³⁸⁷ between the two warring parties and often during combat activity, even though when a tram is hit by bullets coming from SRK-controlled territory, this is one of the indicia that enable a conclusion as to whether this was done deliberately.
177. The Appellant considers the fact that the tramway was running not far from the respective combat positions of ABiH and SRK units during the period covered by the Indictment is indispensable evidence for any conclusion as to whether possible attacks led by the SRK resulting in trams being hit were deliberately directed against the trams, a fact that must be established beyond a reasonable doubt.
178. This is why the Appellant will consider this issue and the factual conclusions reached by the Chamber in paragraph 223 of the Judgement before taking up the other errors of fact committed by the Chamber regarding incidents involving trams.

Trams did not run during combat

179. No reasonable Chamber would be able to find from the evidence in the case file that trams did not run during combat. Taking only the incidents in Annex 1 of the Indictment, one can see:

³⁸⁵ Paragraph 224 of the Judgement.

³⁸⁶ Paragraphs 27 to 32 of the Judgement.

³⁸⁷ T. 1867/12 to 1870/10 (W42); D49, D50, D80; P853; P388; D146; T. 4177/9 to 4179/é (W70); D41; P877.

- concerning the incident of 8 October 1994, it follows from Exhibit D80 that on 9 October 1994, General Michael Rose sent two letters, one to Radovan Karadžić and one to Alija Izetbegović, telling them: "I write to protest in the strongest possible terms about the sniping incidents which took place on 8 October 1994, in the City of Sarajevo from both sides of the line of confrontation";
 - concerning the incident of 21 November 1994, it ensues from Exhibit D146, which is an ABiH combat report, that the situation was tense between the two warring parties and that both of them were attacking around the confrontation lines, within the meaning of Article 49 of Protocol I;
 - concerning the incident of 23 November 1994, which took place in the afternoon, Exhibit D38 proves that the situation in Sarajevo was tense at the time the tramway was running because "Sector Sarajevo went to state of alert red at 1200A";³⁸⁸
 - concerning the incident on 27 February 1995, it ensues from exhibits D41 and P877 that combat activities took place at the same time and in the same sector.³⁸⁹
180. The BiH Government decided to put the trams back in operation practically on the first frontline.³⁹⁰
181. The Chamber committed an error of fact by judging in paragraph 909 of the Judgement that trams were targeted by members of the SRK when they were driving along the "S" curve in front of the Holiday Inn hotel and that this showed, among other things, the SRK's intention to spread terror among the civilians. Nevertheless, this is not the case since it ensues from the evidence that when the tram was making this curve and had the form of a crescent, it was exposed to buildings on both sides of the confrontation line.³⁹¹
182. In view of the fact that all the tramway incidents took place in the Marin Dvor zone, whose military situation is described in paragraph 70 of the Brief, before

³⁸⁸ D38, page 2 under B.1. Sector Sarajevo.

³⁸⁹ D41, page 9 and P877, page 8.

³⁹⁰ T. 1880/6-21 (W42).

³⁹¹ T. 858/3-5 and 866/16 to 867/14 (W83, 23 January 2007) and D22.

concluding that the sniper fire came from SRK-held territory, the Chamber should have proved beyond a reasonable doubt the following:

- the tram's location at the moment of impact;
- the tram's position at the moment of impact with respect to possible sources of fire;
- the place where the bullet pierced the tram or the body of the victim in the tram (entry point);
- the place where the bullet might have exited (exit point).³⁹²

183. The Chamber, however, did not establish these indicia and based its conclusions almost systematically on the Bosnian police reports that do not clarify them either. The Chamber seems to accept the rumours that the SRK sharpshooters were firing from the Metalka building.

3rd sub-ground: the incident on 18 November 1994 (paragraphs 339-341 of the Judgement)

184. The Chamber reached several factual conclusions based on evidence analysed in paragraphs 325 to 338 of the Judgement:

- in spite of inconsistencies in Dženana Sokolović's testimony and in case-file evidence concerning the exact location of the victims at the time of the incident, the sniper position in the Metalka Building could have targeted the victims at the places indicated respectively by Dženana Sokolović and the exhibits tendered into evidence;³⁹³
- Dženana Sokolović was hit on the right side of her body and the bullet went through her abdomen and exited on the left side, then continued its trajectory through the head of Nermin Divović;³⁹⁴
- the entry and exit wounds on Nermin Divović were correctly described in the autopsy report and not by the police report;³⁹⁵

³⁹² D360, expert report by Ivan Stamenov, Section *Analysis of sniper attacks*, page 13.

³⁹³ Paragraph 339 of the Judgement.

³⁹⁴ Paragraph 340 of the Judgement.

- there is no evidence that the shot came from ABiH-held territory;³⁹⁶
- the only reasonable conclusion is that the shot came from the Metalka Building, a well-known SRK sniper position;³⁹⁷
- there is no evidence that someone else not belonging to the SRK could have been the source of this fire;³⁹⁸
- the bullet was fired by a member of the SRK.³⁹⁹

185. One of the most important facts to establish beyond a reasonable doubt concerning this particular incident is the position from which the bullet or bullets were fired that killed Nermin Divović and wounded Dženana Sokolović.

Position from which the bullet was fired that killed Nermin Divović and wounded Dženana Sokolović

186. In order to establish this, a reasonable Chamber would have taken the following indicia:

- the victim's location at the moment of impact;
- the victim's position at the moment of impact with respect to the possible sources of fire;
- the place where the bullet penetrated the victim's body (entry wound);
- the place where the bullet might have left the victim's body (exit wound).⁴⁰⁰

187 In the first instance case file, there are several exhibits that provide the above indicia, which the Chamber should have established beyond a reasonable doubt in order to ascertain whether the Prosecution proved beyond a reasonable doubt, as alleged in the Indictment, that SRK

³⁹⁵ *Idem.*

³⁹⁶ Paragraph 341 of the Judgement.

³⁹⁷ *Idem.*

³⁹⁸ *Idem.*

³⁹⁹ *Idem.*

⁴⁰⁰ D360, expert report by Ivan Stamenov, Section *Analysis of sniper attacks*, page 13.

members were behind this fire, within the meaning of the Appeal Chamber's jurisprudence pertaining to the evaluation standard for evidence.⁴⁰¹

Victim's location at the moment of impact

188. The Appellant considers that the Chamber did not determine this location beyond a reasonable doubt.

189. It nevertheless found in paragraph 339 that:

“There are discrepancies in Dženana Sokolović's evidence and in the documentary evidence with regard to the exact location where she and her son were shot. The Trial Chamber finds that in spite of those discrepancies, it is clear from the expert report of Lt. Van der Weijden and from photographic and video evidence in the case that a sniper located in the Metalka Building could have targeted the victims on both possible locations on Zmaj od Bosne.”

190. The Chamber committed an error in finding that Dženana Sokolović indicated a place where she was located when the bullet hit her. She indicated rather the spot where her son fell, because she did not realize until later that she had been wounded.⁴⁰² A photograph published the day after the incident in “Providence Journal-Bulletin”⁴⁰³ shows little Nermin Divović in a pool of blood in the pedestrian crossing. Even so, it is not possible to establish from evidence in the case file whether his body was moved after the incident.

191. Expert witness Van der Weijden's report speaks of the view that certain rooms in the Metalka Building had of an area between the Museum and the Faculty and not of specific locations as suggested by the Chamber, without foundation.

192. Page 23 of Van der Weijden's report, cited by the Chamber, says:

⁴⁰¹ *Čelebići Appeal Judgement*, para 458.

⁴⁰² Testimony by Dženana Sokolović, T. 796/11 to 798/18 (22 January 2007).

⁴⁰³ P272.

“Rooms in this building offer direct and clear views of the stretch between the Museum and the Faculty as can be seen in the layout and photos 1 and 2 below. Branches of the trees in the street will have grown since the war and now obstruct some of the windows that at that time also would offer an unobstructed view and field of fire at the incident site.”

193. Nothing in this expert witness’s report indicates the foundation for his knowledge about the state of the branches obstructing the view of the stretch between the Museum and the Faculty during the war. It is also possible that branches or other obstacles hindered this view more than on 29 November 2006 when expert witness Van der Weijden took the photos on page 24 of his report.
194. Nevertheless, photographs taken during the Chamber’s on-site visit, in particular photos 24 and 25 of C14, show that the spot marked by Dženana Sokolović as being where she was located when her son fell⁴⁰⁴ is not directly visible from the Metalka Building, if one supposes that the victims were fired on from the direction of Grbavica.⁴⁰⁵

Position of the victims at the moment of impact

195. It ensues from the testimony of Dženana Sokolović that her right side was turned towards Grbavica when the incident took place and her son, who was on her left, changed the position of his body with respect to Grbavica, because he turned his head to talk to her.⁴⁰⁶ There was no other evidence that could establish this fact.
196. Even if Dženana Sokolović was mistaken before the Chamber when she had to distinguish between her right side and left side, she provided other information making it possible to establish that she was walking with her children at the time of the incident, going from west to east on Zmaj od Bosne Street.⁴⁰⁷

⁴⁰⁴ D18.

⁴⁰⁵ Compare with P515.

⁴⁰⁶ T. 785/6 to T. 786/12 (W129).

⁴⁰⁷ T. 772 (W129) and P88.

197. On the Sarajevo street map,⁴⁰⁸ one notes that the neighbourhood of Grbavica was on Dženana Sokolović's right side.

Entry and exit wounds of the bullet that killed Nermin Divović and wounded Dženana Sokolović

198. The Chamber found in paragraph 340 of the Judgement that Dženana Sokolović was hit on the right side of her body and that the bullet passed through her abdomen and went out on her left side, then continued its path through the head of her son, /Redacted/,⁴⁰⁹ entering his right cheek and exiting on the left side at the back of his neck.
199. Knowing that to the right of Dženana Sokolović was SRK-held territory, the spot where the bullet entered Dženana Sokolović's abdomen is the indicia which, together with other indicia mentioned in paragraph 186 of the Brief, establishes a crucial fact in determining the Appellant's guilt pursuant to the Čelebići jurisprudence⁴¹⁰, i.e. the origin of fire, and consequently must be proved beyond a reasonable doubt. To do this, all the evidence relating to this fact must be assessed as being beyond a reasonable doubt.

Evidence regarding the entry and exit wounds of the bullet that killed Nermin Divović and wounded his mother

200. First, the evidence includes medical documents⁴¹¹ compiled at the time of the incident when Dženana Sokolović entered the Koševo Hospital and regarding the death of Nermin Divović that establish, respectively, that the entry wound of the bullet that wounded Dženana Sokolović was on her left side and the exit wound was on the right side of her abdomen, and that the entry wound of the bullet that killed Nermin Divović was on his right cheek and the exit wound was on the left side of the back of his neck.
201. Next, there is the testimony of Dr Šefik Bešlić, the doctor who operated on Dženana Sokolović in 1994, who established that the entry wound of the

⁴⁰⁸ P104.

⁴⁰⁹ P457.

⁴¹⁰ Čelebići Appeal Judgement, para. 458.

⁴¹¹ D19, pages 5 to 9.

bullet that wounded Dženana Sokolović was located on the right side and the exit wound was on the left side of her abdomen.⁴¹²

202. Furthermore, there is Dženana Sokolović's testimony before the Chamber. She gave several responses concerning the bullet's entry and exit wounds, but finally declared that when she was hit by the bullet, she did not know on which side it had entered her body,⁴¹³ which seems quite logical given the great speed with which a bullet passes through an object,⁴¹⁴ regardless of the fact that she "consistently indicated with her hands that the bullet entered her abdomen on the right side and exited on the left side". In fact, Dženana Sokolović was proofed for her testimony by the Prosecution, whose case was that the bullet was fired from SRK-held territory under the command of the Appellant, while the video on which Dženana Sokolović shows without hesitation the bullet's entry and exit wounds and the direction from which she was fired at,⁴¹⁵ was filmed by the Prosecution without any monitoring and without any way of knowing what happened before it was made and what suggestions were made to Dženana Sokolović by the Prosecution staff member who appears in the video.
203. Consequently, a reasonable Chamber should not have attached too much weight to the evidence of Ms Dženana Sokolović with regard to the bullet's entry and exit wounds, in particular because it had other evidence at its disposal.
204. The Bosnian police report on the incident also contains information concerning the entry and exit wounds of the bullet that killed Nermin Divović and wounded Dženana Sokolović,⁴¹⁶ i.e. the entry wound was on the right side of Dženana Sokolović's body and the exit wound on the left side, while the bullet allegedly entered the body of Nermin Divović through the back of his neck, above his right ear and exited under his left eye.

⁴¹² D19, pages 11 and 12.

⁴¹³ See T. 798-799.

⁴¹⁴ D360, page 4.

⁴¹⁵ P941.

⁴¹⁶ D19, page 4.

205. Finally, it ensues from the Bosnian police criminal charges sent to the Public Prosecutor of the Sarajevo Cantonal Tribunal⁴¹⁷ that the bullet passed through Nermin Divović's head and then seriously wounded Dženana Sokolović in the abdomen.
206. If we recapitulate all the evidence admitted by the Chamber concerning the entry and exit wounds of the bullet through Dženana Sokolović's and Nermin Divović's bodies, as well as the order in which they were hit, we note that this evidence provides different determinations for indicia that is essential to draw conclusions about the direction from which this bullet was fired.
207. Unfortunately, the Chamber does not clearly explain the reasons why it preferred some of this evidence over other evidence when it established the indicia that allowed it to conclude on the origin of the fire and thereby the Appellant's guilt, which it would have done if it had not respected the obligation to provide a reasoned decision.⁴¹⁸ More precisely, it is uncertain why the Chamber found, firstly, that the Bosnian police report was probative with regard to Dženana Sokolović's wounds and is not for Nermin Divović's; next, that the autopsy report was acceptable even though it is contradicted by the police report and by exhibits D271 and D272; that the testimony of Dr Bešlić was more reliable than the medical report for Dženana Sokolović.
208. It seems that the Chamber based its findings on the testimony of Dr Bešlić, in spite of what is contained in an authentic document,⁴¹⁹ that Dženana Sokolović was hit on the right side of her body and that the bullet passed through her abdomen and exited on the left side. This is why the Appellant considers that this evidence should have been established beyond a reasonable doubt, which is not the case.

Evaluation of Dr Bešlić's evidence

⁴¹⁷ D19, paragraph 1.

⁴¹⁸ *Kupreškić* Appeal Judgement, para. 32.

⁴¹⁹ P456.

209. Dr Bešlić was not on the Prosecution's 65 *ter* list of witnesses. It was only after Dženana Sokolović appeared before the Chamber on 22 January 2007 and after the Appellant tendered Exhibit D19 into evidence, questioning the Prosecution's allegation concerning the origin of fire, that the Prosecution took the written statement of Dr Bešlić, the doctor who operated on Dženana Sokolović on 18 November 1994. The Prosecution first wanted to tender this statement into the file pursuant to Rule 92 *bis*, but finally Dr Bešlić appeared before the Chamber and his statement was tendered pursuant to Rule 92 *ter*.⁴²⁰
210. During the Prosecution's trip to Sarajevo to interview Dr Bešlić on 30 January 2007, he examined Dženana Sokolović.
211. The circumstances in which the Prosecution used the testimony of Dr Bešlić /Redacted/⁴²¹ and /Redacted/,⁴²² should have alerted a reasonable Chamber to take all necessary precautions to assess the evidence and give it the proper weight.⁴²³
212. Unfortunately, the Chamber does not clearly explain the reasons why it preferred Dr Bešlić's evidence to an authentic document when establishing the indicia that allowed it to conclude on the origin of fire and thereby on the Appellant's guilt.⁴²⁴
213. In paragraphs 332 and 333 of the Judgement, the Chamber refers to the testimony of Dr Bešlić in which he speaks of the error made by his young colleague Dr Šabanović⁴²⁵ in order to explain the difference between the information contained in the medical document⁴²⁶ and his own testimony. The Chamber says that Dr Bešlić explained that the correct information is obtained by seeing the patient and that a bullet's entry wound is smaller than its exit wound. Nevertheless, the Chamber disregarded the parts of Dr Bešlić's testimony where he explains that Dr Šabanović had indeed seen

⁴²⁰ P521.

⁴²¹ P107 and P456.

⁴²² P400 to P471.

⁴²³ *Kupreškić* Appeal Judgement, para. 31.

⁴²⁴ *Kupreškić* Appeal Judgement, para. 32.

⁴²⁵ T. 4419-4420, 4425-4427).

⁴²⁶ P456.

the patient before writing his report⁴²⁷ and the fact that Dr Šabanović's report says that the entry wound measured 0.5 cm and the exit wound 3 cm X 2 cm,⁴²⁸ which is quite compatible with Dr Bešlić's testimony as a doctor with considerable experience.

214. It then seems that the Chamber finds the testimony of Dr Bešlić corroborated by the testimony of Dženana Sokolović,⁴²⁹ which adds to its probative value. But this is not the case, since Dženana Sokolović drew her information about the direction from which the bullet passed through her abdomen from the statements of others, in particular the Prosecution that prepared Exhibit P941 and proofed Ms Sokolović before she appeared before the Chamber.
215. In Dr Bešlić's written statement dated 30 January 2007,⁴³⁰ he says that after reading the medical documentation established at the time of the surgical operation he performed on Dženana Sokolović in 1994, he can conclude that the bullet's point of entry into the patient's body is on the right side, since "without being unduly technical, my opinion is that because of the location and shape of the liver, and the location of the contusion, the bullet most probably entered the patient's abdomen on the right side and exited on the left side."
216. Nevertheless, during his appearance before the Chamber, in answer to the question "Whichever entry or exit wound, I think it's the passage of the bullet next to the liver that actually leads to the contusion. Is that right?"⁴³¹ Dr Bešlić answered "Yes". A reasonable Chamber would have found from his response 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.
217. The fact remains that the testimony of Dr Bešlić is based solely on the position and appearance of the scars left on Dženana Sokolović's body after the bullet passed through her abdomen that he examined more than 12

⁴²⁷ T. 4434/13-14.

⁴²⁸ P456 under *Status Praesens*.

⁴²⁹ First sentence of paragraph 330 of the Judgement.

⁴³⁰ P521.

years after the incident. During this new examination, no photographs were taken of the scars.⁴³² In his written statement, Dr Bešlić says: "Today I examined Dženana Sokolović again, paying particular attention to the scars on her abdomen left by the bullet wound in 1994. I can now state that without doubt, the bullet which wounded Dženana Sokolović entered the right side of her abdomen and exited on the left side of her abdomen."

218. Even if Dr Bešlić has no doubts in his written statement, taken by the Prosecution, he admitted during his appearance before the Chamber that after more than 12 years, which is the amount of time between the incident and his examination of Dženana Sokolović, deformations of the scars were possible.⁴³³ Furthermore, expert witness Ivica Milosavljević, medical examiner, testified before that Chamber about the poor probative value of scars, when one has to qualify a wound.⁴³⁴

219. Dr Bešlić disclaimed the medical document compiled by his colleague when Dženana Sokolović was admitted to Koševo Hospital after examining the patient and before the surgical operation that he performed, assisted by his colleague. He disclaimed it based on an examination of the scars left by the bullet on the body of Dženana Sokolović conducted more than 12 years after the incident, knowing that scars are likely to become deformed over time. The Appellant consequently considers that no reasonable Chamber could have established beyond a reasonable doubt, based on Dr Šefik Bešlić's testimony, that Dženana Sokolović was hit on the right side of her body and the bullet passed through her abdomen and exited on the left side.

Evaluation of the autopsy report of Nermin Divović in the light of other evidence

220. In paragraph 340 of the Judgement, the Chamber found that the bullet exited the body of Dženana Sokolović on the left side and continued its path through the head of Nermin Divović, entering through the right cheek

⁴³¹ T. 4450/8-12.

⁴³² T. 4440, 4441.

⁴³³ T. 4436, 4437.

⁴³⁴ T. 9283/18 to 9284/1.

and exiting on the left side of the back of his neck, as described in the autopsy report.⁴³⁵

221. The Bosnian police report of the incident⁴³⁶ indicates that the bullet that killed Nermin Divović entered his body through the back of his neck, above his right ear, and exited through the left cheek under the left eye.

222. The Chamber rightly says that after analysing the video filmed after the incident⁴³⁷ and the photograph,⁴³⁸ one notes that Nermin Divović has wounds not on his left cheek, but on his right cheek. Nevertheless, the Chamber did not note something that also becomes obvious after analysing this evidence, which is that the wound on his cheek is much larger than the wound on the back of his neck. Applying the distinction made by Dr Bešlić regarding the entry and exit wounds of a bullet in a human body,⁴³⁹ this proves that the entry wound was on the left side of the back of the boy's neck and the exit wound was on the right cheek, contrary to what is written in the autopsy report. Likewise, one can see on the video and on the photograph,⁴⁴⁰ provided that his body was not moved after the incident, that Nermin Divović fell forward, which proves, owing to the speed and force of the bullet and the small stature of the boy, that the bullet hit him from behind.

Conclusion on the location from which the bullet was fired that killed Nermin Divović and wounded Dženana Sokolović

223. The Chamber should not have found that the bullet was fired from SRK-held territory unless, after evaluating beyond a reasonable doubt all of the evidence taken individually and taken as a whole with all the other evidence, it was persuaded beyond a reasonable doubt that no conclusion excluding the possibility of the fire coming from SRK-held territory was reasonably possible.⁴⁴¹

⁴³⁵ P457.

⁴³⁶ D19, page 4.

⁴³⁷ P271 starting with the 12th minute.

⁴³⁸ P272.

⁴³⁹ T. 4422.

⁴⁴⁰ P271 and P272.

⁴⁴¹ *Čelibići* Appeal Judgement, para. 458.

224. Nevertheless, it ensues from the evidence available to the Chamber that one of the reasonably possible conclusions, if not the only one, was that the bullet that killed Nermin Divović and wounded Dženana Sokolović came from ABiH-held territory. Consequently, knowing that the Metalka Building is in SRK-held territory, a reasonable Chamber would not have said that the only reasonable conclusion was that the fire came from the Metalka Building, a well-known SRK sniper nest.⁴⁴²

4th sub-ground: incidents in Sedrenik (paragraphs 354, 364 and 378)

225. In the above-cited paragraphs, the Chamber found that Sanela Dedović, Derviša Selmanović and Tarik Žunić were deliberately targeted and hit, as civilians, by SRK members while they were in Sedrenik.

226. Owing to the military situation in Sedrenik described in paragraphs 75 to 77 of the Brief, the Chamber should have determined beyond a reasonable doubt the following indicia:

- the location of the above-mentioned persons at the moment of impact;
- the position of these persons at the moment of impact compared to possible sources of fire;
- where the bullet penetrated the body of the alleged victims (entry wound);
- where the bullet might have left the body of the alleged victims (exit wound).⁴⁴³

227. The evidence, however, does not prove the above indicia beyond a reasonable doubt.

228. The Chamber found erroneously by applying the law erroneously that Derviša Selmanović was a civilian, although she was a member of the BiH armed forces.

⁴⁴² *Idem.*

⁴⁴³ D360, expert report by Ivan Stamenov, Section *Analysis of sniper attacks*, page 13.

229. With regard to the incident that took place on 10 December 1994 in Sedrenik, there are four reports by international representatives: P869 compiled by the UNPROFOR HQ in Zagreb, P760 compiled by UNPROFOR for BiH, P852 compiled by UNMO in Zagreb and P826 compiled by UNMO for BiH. Only the last report contains more extensive detail and notes, from paragraph 24 onward, that on the day of 10 December 1994, the sector of Špicasta Stjena was very active, that the origin of fire was unknown and that a woman (who is called a *civilian*, while the victim stated before the Chamber that she was a member of the ABiH armed forces⁴⁴⁴) was wounded, allegedly at Sedrenik.

5th sub-ground: the incident on 24 October 1994 (paragraphs 393 to 397 of the Judgement)

230. This incident took place in Vojničko Polje, practically on the first frontline that separated ABiH-held territory from SRK-held territory in Nedžarici. The military situation in Vojničko Polje, described in paragraph 62 of the Brief, required that the Chamber determine beyond a reasonable doubt the following indicia before concluding that SRK members posted in the School for the Blind in Nedžarići shot at Adnan Kasapović and his friends:

- the location of these persons at the moment of impact;
- the position of these persons at the moment of impact with respect to the possible sources of fire;
- where the bullet penetrated the body of the alleged victims (entry wound);
- where the bullet might have exited the body of the alleged victims (exit point).⁴⁴⁵

231. From evidence tendered into the case file, the only thing that can be determined is the part of Adnan Kasapović's body where the bullet fatally wounded him and the direction of its movement. Nevertheless, in an environment such as Vojničko Polje, the Chamber should have borne in

⁴⁴⁴ T. 1603/9-11 (W19).

mind all the facts contained in paragraph 170 of the Brief that cast reasonable doubt on the finding regarding the origin of fire and should not have excluded the possibility of a stray bullet or a ricochet.

232. The victim, Adnan Kasapović, born on 14 January 1978, was walking with two friends of approximately the same age at 0600 on a misty morning,⁴⁴⁶ behind a building containing ABiH soldiers⁴⁴⁷ that had been emptied of civilians.⁴⁴⁸
233. Witness W62, who was with Adnan Kasapović that morning, testified before the Chamber, certainly to impress the Chamber, that it had been Adnan Kasapović's birthday, while his birthday is 14 January and not 24 October. Witness W62 did not explain why he was on the first frontline at that time and the Chamber did not establish this fact beyond a reasonable doubt.
234. In any case, the Appellant considers that one of the reasonably possible conclusions, within the meaning of the *Čelebići* jurisprudence,⁴⁴⁹ particularly when we know that even young boys bore arms⁴⁵⁰ on ABiH-held territory in Sarajevo, would be 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. Since this conclusion supports the innocence of the Appellant, the Chamber had the duty to take it into consideration.

8th GROUND OF APPEAL

No reasonable Chamber would have found that members of the SRK were behind specific mortar shellings:

1st sub-ground: incident on 18 November 1994 (paragraphs 462 to 465 of the Judgement)

⁴⁴⁵ D360, expert report by Ivan Stamenov, Section *Analysis of sniper attacks*, page 13.

⁴⁴⁶ T. 883 (W62, 23 January 2007); D362.

⁴⁴⁷ T. 917 (W62, 23 January 2007).

⁴⁴⁸ T. 8841 (T60).

⁴⁴⁹ *Čelebići* Appeal Judgement, paragraph 458.

⁴⁵⁰ Paragraph 126 of the Brief.

235. In paragraphs 456 and 457, the Chamber relates all the contradictions involving the different reports on this incident, but seems to have reconciled them since it finds in paragraph 464 that the use of Finnish mortar tables was behind these contradictions and that the fire came from SRK-held territory.
236. The Appellant challenges the procedure used by the Chamber as being contrary to the rules regulating proof beyond a reasonable doubt.⁴⁵¹
237. No evidence corroborates the statement of Witness W114 concerning the use of Finnish mortar tables.
238. It ensues from exhibits P378, D85, P578 and D84 that the contradictions in the reports are such that the Chamber should have found the Appellant innocent, particularly when bearing in mind all the circumstances that accompanied the investigations mentioned in paragraph 450 of the Judgement and the testimony of Witness W9 mentioned in paragraph 459 of the Judgement.

2nd sub-ground: the incidents on 22 December 1994 (paragraphs 473 and 474 of the Judgement)

239. In the above-cited paragraphs, the Chamber refers to the shelling incident of 22 December 1994, during which /.../⁴⁵² and made several factual conclusions:

- on 22 December 1994 two mortar shells exploded at the Baščaršija flea market;
- the direction of fire was south-east, i.e. from Mount Trebević;
- the shell was launched from SRK-held territory by members of the SRK;
- at least seven civilians were wounded, of whom three seriously, and two civilians were killed.

⁴⁵¹ *Čelebići* Appeal Judgement, paragraph 458.

⁴⁵² Annex B of the Amended Indictment, Count 1 – Terror and Counts 5 to 7 – Shelling.

240. Since this incident is part of the attacks against civilians with the intention of spreading terror, as well as the assassinations and inhuman acts charged against the Appellant, all of these elements must be established beyond a reasonable doubt.⁴⁵³ The same can be said for the evaluation of the witness statements on which the Chamber based its conclusions.⁴⁵⁴
241. One of the most important facts to establish beyond a reasonable doubt concerning this particular incident is the origin of the shells fired at the Bašćaršija flea market and, if this place was located in SRK-held territory, whether any possible victims were civilians and if so, whether they were intentionally targeted (malicious intent or rashness).
242. Firstly, the Appellant would draw the Appeals Chamber's attention to the fact that the incident took place in the zone of responsibility of the ABiH 115th Brigade, of which W12 was a member. Confronted with P194, he confirmed that this map showed the position of the 115th Brigade.⁴⁵⁵

Origin of fire

243. Pursuant to ICTY jurisprudence as set out in paragraph 318 of the Galić Appeal Judgement, the Appeals Chamber said:

“Determination of where a shell comes from is an extremely difficult process. To be precise the bearing, angle of descent and charge must all be known. Working ex post, these data are obviously rarely available and have to be reconstructed, as in this case, from data gathered at the site of impact. Data from the site would include, inter alia: the depth of the crater created by the shell, the shape, size and location of the disturbance of the ground around the crater; any tailfins, igniters, shrapnel or other objects recovered from explosion; and the surrounding topography, both close and far. But, as is apparent from the evidence discussed by the Trial Chamber, not all of these data are susceptible to precise measurement, and even when they are, they can lead to a range of possible solutions.”

⁴⁵³ *Halilović* Appeal Judgement, para. 130 and footnote 350; *Ntagerura* Appeal Judgement, para. 175.

⁴⁵⁴ *Kupreskić* Appeal Judgement, para. 226; *Ntagerura* Appeal Judgement, para. 170.

⁴⁵⁵ P194 and W12 T. 3079/11-12.

244. The Appellant would first note that the Chamber found discrepancies in the evidence regarding the type and calibre of the shell.⁴⁵⁶ Thus, according to reports from the Bosnian police, these were two shells fired from a 76mm gun,⁴⁵⁷ while the UNMO report speaks of 82mm mortar shells.⁴⁵⁸
245. The Chamber draws no conclusions from the above-mentioned discrepancies. The type of projectile, however, is an element that makes it possible to eliminate certain locations as the origin of the fire. According to expert witness Desimir Garović's expert report, an 82mm mortar and 76mm gun have different maximum firing ranges,⁴⁵⁹ with 8860mm for the gun and between 471m (with the first charge) and 4850m (with the 6th charge) for the 82mm mortar.
246. The Chamber did not ascertain beyond a reasonable doubt the type and calibre of the projectile that exploded on 22 December 1994, although this is one of the indicia that allows a finding concerning the origin of fire. It seems that the Chamber approves of the reasoning of the Bosnian police who concluded, due to the lack of a tailfin, that it was shot from a gun and not from an 82mm mortar. Nevertheless, the absence of a tailfin could also lead to the conclusion that it was an explosive device set off in static conditions.

Direction of fire

247. The direction can be determined based on the traces a shell leaves on the ground and by its crater. With regard to the direction, the Chamber clearly accepted the conclusions of the Bosnian police which are similar to those made by UNMO, i.e. 159 or 160 degrees, even if they do not say so directly and speak of a south-easterly direction.

Angle of descent

⁴⁵⁶ Paragraph 469 of the Judgement.

⁴⁵⁷ P310 and P315.

⁴⁵⁸ D101.

⁴⁵⁹ D366, for the gun, page 3, English version, and for the 82 mm mortar, page 4.

248. There is no evidence that determines the angle of descent regarding this incident and the expert called by the Prosecution made no statement in this regard, which the Appellant finds strange.

Charge

249. The Appeals Chamber says in the Galić Appeal Judgement::

“But the bearing and the angle of descent alone are not enough. The type or amount of charges is also important in order to determine speed, and thus how far the shell traveled. As the UNPROFOR report noted, a mortar can be fired with six different charges, so even if the angle of descent and bearing are known perfectly, a mortar can have come from six locations. But the amount of charge can be reconstructed. To determine the charge, one needs to determine the speed at which the shell was traveling when it hit the ground, and the best evidence for this comes from the depth of the crater it makes, and the composition of the ground.”⁴⁶⁰

250. None of the indicia determined by the Appeals Chamber in the Galić case as being important to establish the origin of fire was established by the Chamber.
251. While considering that not even the direction of fire was determined by the Chamber beyond a reasonable doubt, the Appellant would draw the Appeals Chamber’s attention to Exhibit D102,⁴⁶¹ on which a line is marked from Baščaršija towards the south-east. This map shows that Čolina Kapa, Mala Čolina Kapa and Vidikovac are very close to this line and in the same direction from Baščaršija. Given that Čolina Kapa and Mala Čolina Kapa were under ABiH control and the confrontation lines between the two parties were very close to each other,⁴⁶² even if the Chamber could accept the direction of south-east having been proved beyond a reasonable doubt by the Prosecution, it needed to determine the charge of the projectile in order to be able to find beyond a reasonable doubt the distance

⁴⁶⁰ *Galić* Appeal Judgement, paragraph 330.

⁴⁶¹ D124, page 13 of the BCS version is a map (D102) marked by Witness W131 and its legend is on page 7 of the English version.

⁴⁶² In particular W76 T. 2025 to 2026/4; W12 3041/22-25; 3065/11-16; 3066/9-14 and 3088/15-23; T62 T. 5725/7-11; D 110.

between the point of impact and the point of the origin of fire, so as to finally find that the origin of fire was on SRK-held territory and consequently the fire was from members of the SRK.

252. Given that practically no indicia making it possible to determine the location of fire on 22 December 1994 have been established beyond a reasonable doubt, it seems to the Appellant that the Chamber made its conclusions by accepting the testimony of W12, which is why this testimony must be proved beyond a reasonable doubt.

Testimony of W12

253. The Chamber heard W12's testimony and had two written statements established by the Prosecution and tendered into the case file.⁴⁶³ In the statement made one year after the facts, W12 said that /Redacted/. When questioned by the Defence regarding the date of the incident, he said that it was a mistake and that he had not understood the question referring to why he signed an erroneous statement.⁴⁶⁴
254. But in his statement P307, taken by the Prosecution on 20 April 2006, W12 said: /Redacted/. Confronted with this statement, W12 attested before the Chamber that he was not sure of the date.⁴⁶⁵
255. Finally, at the end of the cross-examination, in answer to a question intended to determine the date W12 responded:
- “I think it was in November 1994, but let's leave it at that. It's just an assumption. I'm 90 per cent certain that it was November 1994, but not entirely positive.”⁴⁶⁶
256. To clarify the issue of the date of the incident that W12 witnessed, the Prosecution tendered a new official note into the file compiled by the Bosnian police, P309. This document, however, was not signed by W12 but only by the policeman in charge of investigating the incident of 22 December 1994. This is why, owing to the presence in the case file of two

⁴⁶³ P306 and P307.

⁴⁶⁴ T. 3060/6-26

⁴⁶⁵ T. 3067/3-28 and 3068/1-5.

statements signed by W12 and his evidence before the Chamber, a reasonable Chamber could not assign any weight to the date of the facts witnessed by W12.

257. In addition, W12 testified that he heard a single shot during the incident on which he testified.⁴⁶⁷ In fact, in his written statement that is the closest to the incident, /Redacted/.⁴⁶⁸
258. The case file contains a document with 13 statements by eyewitnesses to the two explosions that took place on 22 December 1994 at the Baščaršija flea market.⁴⁶⁹ These statements, compiled by the Bosnian police several days after the incident, are signed by those giving the statements. The witnesses heard neither the shells being fired nor their flight,⁴⁷⁰ except for two of them who heard, respectively, the hissing of the shell⁴⁷¹ and a high-pitched sound coming from Trebević.⁴⁷² On the other hand, they all heard the two explosions at the site of the incident and none of them heard the loud noise of the shot as heard by W12. The Bosnian police determined the two points of impact of the projectiles during the incident of 22 December 1994.⁴⁷³
259. A reasonable Chamber that had taken the statements in D124 in their entirety and those given by W12, with his testimony at the hearing, as well as Exhibit P318, would not be able to find beyond a reasonable doubt that W12 testified about the same incident as the witnesses interrogated by the Bosnian police, except if W12 had also heard the two explosions at the flea market and not, as he said, the firing of a shell from a canon located on Vidikovac, accompanied by the explosion at Baščaršija. The Appellant would like to note that according to W12, it was a misty morning and

⁴⁶⁶ T. 3078/2-4.

⁴⁶⁷ 3076/19 to 3077/2.

⁴⁶⁸ P306.

⁴⁶⁹ D124, English version, pages 16 to 29.

⁴⁷⁰ For example, D124, page 28, English version.

⁴⁷¹ D124, page 21, English version.

⁴⁷² D124, page 24, English version.

⁴⁷³ P318, marked as points 2 and 12 of the on-site drawing.

Bašćaršija was covered with fog and consequently invisible from Brajkovac.⁴⁷⁴

Conclusion on the origin of the fire on the Bašćaršija flea market

260. The Chamber should only have found that the shells that exploded at the Bašćaršija flea market were fired from SRK-held territory if, after having assessed beyond a reasonable doubt all of the evidence individually and as a whole with other evidence, it was persuaded beyond a reasonable doubt that no conclusion excluding the possibility of the fire coming from SRK-held territory was reasonably possible.⁴⁷⁵

261. It ensues from the evidence available to the Chamber, however, that other reasonably possible findings were, firstly, that the shells were fired from ABiH-held territory and secondly, that the explosive devices were set off in static conditions.

3rd sub-ground: the incident on 28 August 1995 (paragraphs 715 to 724 of the Judgement)

262. First, the Chamber notes the numerous controversies involved in this incident.⁴⁷⁶ Nevertheless, the Chamber found that the SRK was behind the explosion that took place on 28 August 1995 at Markale.

263. The Appellant considers that the Chamber could not have found beyond a reasonable doubt⁴⁷⁷ that the SRK fired the mortar shell that exploded at Markale market.

264. According to the testimony of General Smith, a quick decision concerning the origin of fire had to be made for military needs in spite of all the controversies.⁴⁷⁸ General Smith opted, at the time, for the version that put the Serbian camp to blame, even though the elements used to make his military decision, i.e. the fact that the shots were not heard by anyone and that radar did not pick them up, reasonably suggested another reasonable

⁴⁷⁴ T. 3041/18 and 3070/11-14.

⁴⁷⁵ *Čelebići* Appeal Judgement, para. 458.

⁴⁷⁶ Paragraph 715 of the Judgement.

⁴⁷⁷ *Čelebići* Appeal Judgement, paragraph 458.

⁴⁷⁸ T. 3336/17 to 337/16 (7 March 2007).

conclusion, which was that an explosive device was set off in static conditions.⁴⁷⁹ The Chamber committed an error of law by applying the same standards as the military who had to find rapid and pragmatic solutions in wartime, instead of applying those established before the ICTY.

265. The Chamber should have established the indicia that allowed it to conclude about the origin of fire beyond a reasonable doubt.⁴⁸⁰ The Chamber, however, seems to accept the testimony of expert witness Higgs who based his expert report on hypotheses that were not corroborated by the evidence available to the Chamber.⁴⁸¹

Reports compiled by UN forces right after the incident

266. There are several reports and none of them establishes the origin of fire, even though the last one is dated 30 August 1995, at a time when NATO had already started bombing the Serbs.⁴⁸²

Sound

267. "A mortar makes three types of sounds. The shot, the shell being fired, that's one sound, and it has rather peculiar characteristics. The other sound is the sound made by the round on its descent; it's a whistling sound, a piercing sound. And the third sound is the moment when the shell actually explodes."⁴⁸³

268. In general, when a shell is fired the detonation can be heard.⁴⁸⁴

269. A shell produces a sound when it moves through the air before exploding.⁴⁸⁵ The sound intensifies as it approaches the ground and lasts from 15 to 20 seconds.⁴⁸⁶ It is impossible not to hear anything.⁴⁸⁷

⁴⁷⁹ T. 9122/10-23 (23 August 2007).

⁴⁸⁰ *Galić* Appeal Judgement, paragraphs 318 and 330.

⁴⁸¹ T. 5025/3 to 5027/5 (24 April 2007).

⁴⁸² D10; P85; D117; P86; D356 and T. 8982/17 to 8985/6 (T11, 21 August 2007).

⁴⁸³ T. 9111/6-10 (23 August 2007).

⁴⁸⁴ T. 9109/23 to 9110/13 (23 August 2007).

⁴⁸⁵ T. 5090/14 to 5092/22 (24 April 2007); T. 4890/18 to 4892/4 (20 April 2007); D172, page 1; T. 9114/1 to 9115/5 (23 August 2007).

⁴⁸⁶ T. 9115/10-21 (23 August 2007).

270. Acoustical devices can register the sound produced by a shell being fired and determine the origin of fire.⁴⁸⁸
271. Neither the members of UNMO,⁴⁸⁹ nor the acoustical devices,⁴⁹⁰ on the spot registered the sound of a shell being fired or the sound of its flight through the air. Knustad from UNMO first saw the smoke and then heard the explosion of the shell from his post in Sedrenik, without hearing the sound of its flight.⁴⁹¹ Konings from UNMO testified that no one heard the sound of the detonation produced when a shell is fired, which for him meant that the origin of fire was located at a great distance from the impact point.⁴⁹² Expert witness Garović explained that at a distance of less than 5000m, the sound of the shot should have been heard, regardless of the configuration of the ground.⁴⁹³ Witness W156, who was near Markale market when the incident took place, did not hear the sound of the flight but only several explosions.⁴⁹⁴

Tailfins

272. According to expert witness Higgs, the tailfins embed further into the ground the greater the charge with which the shell was fired.⁴⁹⁵ During this incident, tailfins were found not in the crater, but at a distance of 10 to 20 m.⁴⁹⁶

Area around the explosion

273. Expert witness Higgs said that the presence of buildings in the area around the explosion excludes certain directions as the possible direction of fire.⁴⁹⁷

⁴⁸⁷ T. 9115/25 to 9116/5 (23 August 2007).

⁴⁸⁸ T. 9116/6 to 9118/4 (23 August 2007).

⁴⁸⁹ D117, page 2, item 5/3.

⁴⁹⁰ T. 3337/2-5 (7 March 2007).

⁴⁹¹ T. 2023/12-19 (13 February 2007) D57; D117.

⁴⁹² T. 3584/12 to 3586/14 (12 March 2007).

⁴⁹³ T. 9112/12 to 9113/1 (23 August 2007).

⁴⁹⁴ T. 5392/23 to 5393/3 (W156, 27 April 2007).

⁴⁹⁵ T. 5013/2-25 (23 April 2007).

⁴⁹⁶ T. 3569/22 to 3570/1 (12 March 2007).

⁴⁹⁷ T. 5062/5-25 (24 April 2007); P589, page 15.

274. /Redacted/ that W156 heard /Redacted/.⁴⁹⁸ The Chamber did not at all bear in mind this evidence which, according to the Appellant, /Redacted/ the thesis of an explosive device set off in static conditions.

Nothing registered by radar

275. There were radar devices on the spot intended to register shell launches.⁴⁹⁹ These devices did not detect any shell being launched on 28 June 1995.⁵⁰⁰ The Chamber cites the explanation given by General Nicolaï with regard to the lack of a recording and that contained in P357.⁵⁰¹ Nevertheless, the Chamber assigns no value whatsoever to the testimony of expert witness Garović who explained the principle of how these radar devices operated, that they only register part of the trajectory and then calculate it afterwards.⁵⁰² Report P357 was compiled ten days after the incident and after the bombing of the Serbian camp in retribution, and the Chamber could have reasonably found, by evaluating this report together with other evidence, that it was compiled not to establish the truth but to justify the military decision taken by General Smith. Reading the paragraph about radar,⁵⁰³ it follows that the radar devices were programmed to register fire coming solely from the ABiH side, i.e. less than 950m, while the confrontation line was located at 1050m, which, according to the Appellant, would be absurd.

276. In any case, if UNPROFOR had placed radar devices in Sarajevo in order to detect shell launches, one can reasonably find that they had taken the landscape around Sarajevo into consideration.⁵⁰⁴

Direction

277. An analysis of the crater can indicate the type of round, the direction of fire and the angle of descent,⁵⁰⁵ although only approximately.⁵⁰⁶

⁴⁹⁸ T. 5336/15 to 5342/8 (W176, 27 April 2007).

⁴⁹⁹ T. 1022/25 to 1023/15 (25 January 2007); T. 348/22-23 (W56, 15 January 2007).

⁵⁰⁰ T. 1023/16-22 (W98, 25 January 2007).

⁵⁰¹ Paragraph 693 of the Judgement.

⁵⁰² T. 9118/19-25 and 9121/25 to 9122/ 2(T18, 23 August 2007).

⁵⁰³ P357, page 3.

⁵⁰⁴ T. 9189/21 to CR 9192/24 (T18, 24 August 2007).

⁵⁰⁵ T. 5006/12-16 (W9, 23 April 2007).

278. In this incident, the analysis of the crater indicated two different angles,⁵⁰⁷ 170° and 220-240°, because of the crater's poor state and shallow depth.⁵⁰⁸ The shallow depth of the crater is explained either by the low velocity of the projectile or by an explosive device set off in static conditions⁵⁰⁹ or by the small charge used when it was fired.⁵¹⁰ The Chamber questioned the method used by expert witness Garović to determine the depth of the crater.⁵¹¹ Nevertheless, the shallow depth was corroborated by other evidence.⁵¹² It seems that the Chamber did not accept the explanation of the shallow depth of the crater put forward by expert witness Garović, which is that an explosive device was set off in static conditions, and opted for the explanation given by expert witness Higgs.⁵¹³ But the Chamber should have assessed all the evidence together to conclude that the possibility of an explosive device in static conditions was not reasonably possible.
279. The two warring parties were located at directions from 170° to 220°.⁵¹⁴ The angle of descent could not be established based on the crater and this is why it was established as a function of the height of the nearby building.⁵¹⁵ The Appellant considers this method to be contrary to the requirements set out in the Galić Appeal Judgement⁵¹⁶ and that in fact it shows that at the time of the incident, a direction that accused the Serbian camp was first determined and the angle of descent was only calculated afterwards.⁵¹⁷ This is the exact opposite of what should have been done, but, as stated in one of the UN reports ("The investigation team tried very hard to prove that the attack came from the Serb side"⁵¹⁸), that is part of these efforts. Expert witness Higgs also opted for angle 170°,⁵¹⁹ without

⁵⁰⁶ T. 9123/9-12 (T18, 23 August 2007) .

⁵⁰⁷ P588 page 9, under (b).

⁵⁰⁸ P588 page 10, under (e); T. 3676/20 to 3677/4 (W76, 13 March 2007).

⁵⁰⁹ T. 9135/14-17 (T18, 23 August 2007).

⁵¹⁰ T. 9126/3-7 (T18, 23 August 2007).

⁵¹¹ Paragraphs 717 and 718 of the Judgement.

⁵¹² Footnote 2453 of the Judgement.

⁵¹³ Paragraph 718 of the Judgement.

⁵¹⁴ T. 3599/11 to 3600/20 (W76, 13 March 2007).

⁵¹⁵ P588, page 11, under (f).

⁵¹⁶ *Galić Appeal Judgement*, paragraph 318.

⁵¹⁷ T. 3575/23 to 3576/6 (12 March 2007).

⁵¹⁸ P85, page 2, item 5/3.

⁵¹⁹ P588, page 13 and 14, under (i), first paragraph.

any valid explanation, to determine several possible locations as the origin of fire,⁵²⁰ without knowing the charge used to launch the shell,⁵²¹ even though it is impossible to determine the origin without a charge,⁵²² knowing that the direction and the origin of fire are two different things.⁵²³

280. In any case, the shallow depth of the crater reasonably indicates either that the shell was launched with a small charge or that the explosion was caused by an explosive device in static conditions.⁵²⁴
281. Using exact methods, D175 shows that the explosion was produced in static conditions, at an angle of 50-60°. Expert witness Garović agreed with the conclusions of Dr Vukašinić in D175.⁵²⁵ The Chamber accepted the testimony of Berko Zečević who considers the conclusions in D175 false since they are based on erroneous data, even though he agrees with the method used.⁵²⁶ But it was up to the Chamber to determine the exact data beyond a reasonable doubt, which it did not do. It accepted the direction of 170°, which the Appellant challenges.
282. Just after the explosion, Colonel Demurenko visited all the places that corresponded to the direction of fire established by the Bosnian police and by UNPROFOR, and to the different charges.
283. Contrary to what the Chamber says,⁵²⁷ he gave a detailed explanation of his actions and his conclusion that it was impossible for the shot to come from SRK-held territory.⁵²⁸ The Appellant is unable to reply more specifically since the Chamber did not specify where Demurenko was vague and evasive.

Charge

⁵²⁰ *Idem*, second paragraph.

⁵²¹ T. 5074/20 to 5075/1 (24 April 2007).

⁵²² P85; T. 3583/11 to 3584/10 (12 March 2007).

⁵²³ T. 3641/25 to 3642/7 (13 March 2007).

⁵²⁴ T. 9134/5-8 and T. 9135/12-17 (T18, 23 August 2007); T. 9209/8 to 9215/1 (T18, 24 August 2007).

⁵²⁵ T. 9149/23 to 9150/10 (T18, 23 August 2007).

⁵²⁶ Paragraph 719 of the Judgement; T. 4936/1 to 4937/3 (W15, 23 April 2007).

⁵²⁷ Paragraph 722 of the Judgement *in fine*.

⁵²⁸ T. 7782/3 to 7795/6 (T11, 6 July 2007) and T. 8942/11 to 8972/18 (T11, 21 August 2007); P807; D357, D358 and D359; P922.

284. From the reports of the investigations made after the incident, it is not possible to establish the charge used to launch the shell.⁵²⁹ Expert witness Higgs said before the Chamber that in a situation where the charge is unknown, “We then have to in most cases then start looking at likely firing positions going back down the bearing, looking where the most likely place you would put a mortar would be,”⁵³⁰ which has to be corroborated by other evidence.⁵³¹ But this was not done in this case.
285. According to the evidence, no one heard the shell being launched, only the explosion; the crater of the explosion was shallow; no tailfins were in the crater.

Conclusion on the origin of the fire on Markale market

286. The Chamber should have found that the shell that allegedly exploded at Markale market was fired from SRK-held territory only if, after having assessed beyond a reasonable doubt all the evidence taken individually and together with other evidence, it was persuaded beyond a reasonable doubt that no conclusion excluding the possibility that the shot came from SRK-held territory was reasonably possible.⁵³²
287. It ensues, however, from the evidence at the Chamber’s disposal that another reasonably possible conclusion was that the explosion resulted from an explosive device in static conditions.

9th GROUND OF APPEAL

No reasonable Chamber would have found that the ABiH did not have aerial bombs and that only members of the SRK had them (paragraphs 107 and 108 of the Judgement).

288. The evidence shows that before 1992, the *Pretis* factory manufactured aerial bombs,⁵³³ that the ABiH got hold of weapons and ammunition from

⁵²⁹ T. 5074/20 to 5075/1 (24 April 2007); D10, P85, D117, P86.

⁵³⁰ T. 5107/5-15 (24 April 2007).

⁵³¹ T. 5043/12 to 5044/6 (24 April 2007).

⁵³² *Celebići* Appeal Judgement para. 458.

⁵³³ T. 4817/18-25 (W15, 20 April 2007).

this factory⁵³⁴ and that the FRY embargo prevented *Pretis* from manufacturing weapons.⁵³⁵

289. The evidence shows that members of the ABiH launched at least one aerial bomb and it hit the RTV building.⁵³⁶

Incident on 28 June 1995

290. The Chamber rightfully found that an aerial bomb exploded on the RTV building on 28 June 1995. But the Chamber did not prove the origin of this bomb beyond a reasonable doubt.
291. Paragraphs 580 to 617 present evidence that the Chamber considers relevant in order to draw conclusions, in particular, on the nature of the projectile and the origin of fire. It evaluates the evidence in paragraphs 618 to 623.
292. The Chamber heard two witnesses who, according to their testimony, were eyewitnesses of the flight and the explosion of the aerial bomb that exploded on the RTV building, i.e. the two UNMO, Per Anton Brennskag (W19) and Andy Knowles. Their testimony differs completely with regard to the direction of the shot. While Brennskag watched the flight of an aerial bomb coming from the south-west or Ilidža, SRK-held territory, Knowles saw an aerial bomb launched from the north-west, ABiH-held territory. While the UNMO Brennskag did not duly report what he saw that day to his superior in the UNMO, Knowles did so, and based on his report, Captain Hansen made a report, which was within his prerogatives.⁵³⁷
293. The Chamber determined the origin of the aerial bomb that hit the RTV building based on the testimony of Brennskag and on the unsigned report made by the Appellant.⁵³⁸

⁵³⁴ T. 6593/23 to 6595/18 (T30, 13 June 2007).

⁵³⁵ D227.

⁵³⁶ D103 and T. 4333 to 4406 (Hansen, 2 April 2007) and T. 9322 to 9407 (Knowles, 25 September 2007).

⁵³⁷ D103.

⁵³⁸ P42.

294. The Appellant considers that the issue of whether the ABiH launched the aerial bomb on the RTV building on 28 June 1994 is crucially important, because the Chamber assessed all the aerial bomb incidents based on its conclusion from paragraph 107 of the Judgement. This is why it should have assessed beyond a reasonable doubt Exhibit D103, the circumstances in which it was drafted by Captain Hansen,⁵³⁹ and all the contradictions in the testimonies of Brennskag and Knowles. The Chamber did not give reasons why it preferred the testimony of Brennskag to the report drafted by UNMO, following the usual procedure.
295. D103 is a report, one among others admitted into evidence by the Appellant and the Prosecution. The Appellant challenges the Chamber's reasoning and finding contained in paragraph 620 concerning the reliability of this report, because it was drafted following customary UNMO procedure.⁵⁴⁰ All the reports admitted by the Chamber were actually drafted by officers in the UNMO HQ located in the PTT building, based on information received from officers who were observing on the spot.
296. Furthermore, the Chamber should have been alerted by the behaviour of the UNMO Brennskag, who did not report the flight and explosion of an aerial bomb to the UNMO HQ at the PTT the day he saw it, as he alleges, and by the difference between his detailed and firm answers during the examination-in-chief, after being proofed by the Prosecution, and his evasive and vague answers during the cross-examination.⁵⁴¹
297. The Appellant found out about the document admitted into evidence as D103 by accident. This document went against the Prosecution's theory that only the SRK had aerial bombs. After this document appeared before the Chamber on 1 February 2007 during the cross-examination of W138, the Chamber did everything it could to disclaim it and called the author of the document, Captain Hansen, to appear. He confirmed that the UNMO had reported to him about the ABiH launching an aerial bomb on the RTV

⁵³⁹ P519.

⁵⁴⁰ T. 4378/4 to T. 4383/23 (Hansen, 2 April 2007).

⁵⁴¹ T. 3448 to 3502 (W19, 8 March 2007).

building, as reported to them by Colonel Knowles, eyewitness to the incident.

298. In the eyes of the Appellant, the fact is not insignificant that the Prosecution removed the name of Captain Hansen from its *65 ter* witness list and did not disclose Exhibit D103 to the Appellant pursuant to Rule 68 of the Rules.
299. It seems to the Appellant that the Chamber's handling of Exhibit D103 was not consistent with its obligation to request proof beyond a reasonable doubt from the Prosecution. Since Exhibit D103 created a reasonable doubt regarding the Prosecution's theory, instead of trying to compromise this document, the Chamber should have asked the Prosecution to provide other evidence that the aerial bomb incidents were representative of attacks led by the Appellant. Instead, the Chamber chose a procedure contrary to the rules regulating the proof of guilt,⁵⁴² but less difficult.
300. Witness Knowles confirmed before the Chamber that he saw an aerial bomb launched from ABiH-held territory. The Prosecution tried to mislead him by giving him incorrect information concerning the impact of the bomb,⁵⁴³ but Knowles' response was unchanged concerning the bomb he saw. Even if he accepted the possibility that there was another bomb the same day, that has no effect on the fact that the ABiH had such a weapon.
301. Knowles testified firmly before the Chamber that Hanssen was very professional⁵⁴⁴ and that neither he nor Hansen had any reasons to invent the fact that members of the ABiH launched an aerial bomb at the RTV building.⁵⁴⁵
302. In paragraph 613 of the Judgement, the Chamber cites the testimony of Knowles, which casts reasonable doubt on the testimony of Brennskag concerning the origin of the bomb from the direction of Ilidža, but it draws no conclusions from it in its findings.

⁵⁴² *Čelebići* Appeal Judgement, paragraph 458; *Ntagerura* Appeal Judgement, paragraph 175.

⁵⁴³ T. 9348/25 to 9349/17 and 9364/1-5 and 9403/3 to 9405/10 (Knowles, 25 September 2007).

⁵⁴⁴ 9387/24 (Knowles, 25 September 2007).

⁵⁴⁵ T. 9388/12-19 (Knowles, 25 September 2007).

303. It ensues from the evidence that on the morning of 28 June 1995, the two warring parties clashed in the sector of the RTV and PTT buildings and that both of them fired mortar shells.⁵⁴⁶ This being the case, even if Exhibit P42 were authentic, which the Appellant challenges since there is no signature on the document, the mortar fired at the RTV building would be a legal response to ABiH attacks. No aerial bomb is mentioned in Exhibit P42. Consequently, the weight accorded this document by the Chamber in paragraph 622 of the Judgement is not justified.
304. Furthermore, NATO had and regularly launched aerial bombs on the territory of Sarajevo, in particular on 26 May 1995.⁵⁴⁷
305. The Appellant does not challenge the fact that the SRK under his command, but also before 10 August 1994, had and used aerial bombs.⁵⁴⁸ What he challenges is that these bombs were launched at the civilian population in Sarajevo.
306. It ensues from the testimony of W163 that the SRK's aerial bombs only flew about one hundred metres after being launched,⁵⁴⁹ which is incompatible with the characteristics of aerial bombs that can reach from 5,780 to 7,680 metres, described by W15.⁵⁵⁰

10th GROUND OF APPEAL

No reasonable Chamber would have found that the explosions that took place between 7 April and 23 August 1995 were aerial bomb explosions (paragraphs 443, 492, 507, 519, 531, 538, 551, 560, 639, 650 and 668).

307. Witness W15, an expert on aerial bombs, gave the technical characteristics of aerial bomb FAB 250 in his expert report. Even if the characteristics vary on the different pages of his report,⁵⁵¹ what is unchanging is that this bomb contains 90 kg of TNT and between 7,000 and 20,000 fragments of

⁵⁴⁶ P519, page 1, paragraph 1 and page 4.

⁵⁴⁷ P27, paragraph 49.

⁵⁴⁸ T. 5800/20 to 5801/14 (T62, 29 May 1994).

⁵⁴⁹ T. 5145/17 to T. 5158/20 (W163, 25 April 2007).

⁵⁵⁰ P586, pages 83, 84 and 88.

⁵⁵¹ Compare what is said about the number of fragments and their weight in report P586, on hard copy pages 104 and 160.

different sizes with each one weighing at least 5 g and able to reach a range of more than 150m.⁵⁵² W15 confirmed the same thing at the hearing⁵⁵³ and so did expert witness T18, an artillery expert.⁵⁵⁴ W15 stated that in specific aerial bomb incidents, according to the traces found on the explosion site, these were FAB 250 bombs charged with aerosol explosives, which were apparently even more destructive than classical FAB 250 bombs.⁵⁵⁵ W15 even had a dispute with the Bosnian Government in this regard,⁵⁵⁶ which he explained as having to do with the incompetence of the Bosnian police.⁵⁵⁷ He gives the characteristics of aerosol bombs and their explosion in his report.⁵⁵⁸

308. On the sites of the respective incidents, investigators found little shrapnel and sometimes none.⁵⁵⁹ W15 explained this absence of shrapnel by the explosion of an aerosol bomb.⁵⁶⁰ But the absence of injuries characteristic of the blast effect on the alleged victims,⁵⁶¹ which according to W15 is the most important effect of these bombs,⁵⁶² together with the absence of shrapnel, could reasonably suggest that this was the explosion of an explosive device other than FAB aerial bombs or aerosol bombs.⁵⁶³
309. During the 12 incidents taken by the Prosecution as examples of SRK bombings, there were 12 dead and 75 wounded, mostly lightly,⁵⁶⁴ which, according to the testimony of T18 and T38, excludes the possibility of aerial bomb explosions.⁵⁶⁵

⁵⁵² P586 page 104; T 4820/19 to 4822/15 (W15, 20 April 2007).

⁵⁵³ T. 4943/19 to 4947/18 (W15).

⁵⁵⁴ D366, page 15.

⁵⁵⁵ T. 4912/6-9 (W15, 20 April 2007).

⁵⁵⁶ T. 4921/20 to 4922/1 (W15).

⁵⁵⁷ T. 4941/5-25 (W15, 23 April 2007).

⁵⁵⁸ P586, page 104.

⁵⁵⁹ For example, P603 or P608 – no shrapnel: T. 5234 /1-5 (W138).

⁵⁶⁰ T. 4946/4-21 (W15, 23 April 2007).

⁵⁶¹ T. 4963/22 to 4964/3 (W15, 23 April 2007).

⁵⁶² T. 4959/22 to 4960/23 (W15, 23 April 2007).

⁵⁶³ D366, page 16 paragraph 4 and T. 9152/3 to 9155/10 (T18, 23 August 2007).

⁵⁶⁴ Paragraph 128 of the Brief

⁵⁶⁵ T. 9152/3 to 9154/18 (T18, 23 August 2007) and T. 8233/22 to 8234/12 (T38, 13 July 2007).

310. Furthermore, no evidence presents a showing that the effects of which W15 speaks in his report⁵⁶⁶ were noted in the territory of Sarajevo between 10 August 1994 and 11 November 1995.⁵⁶⁷

11th GROUND OF APPEAL

No reasonable Chamber would have found that members of the SRK were behind the specific aerial bomb bombings:

311. By erroneously applying the rule of proof beyond a reasonable doubt and resolving the differences contained in the evidence with regard to the origin of the projectile causing the explosions, attributing guilt each time to the Appellant, the Chamber committed several errors of fact, resulting in a miscarriage of justice, and found that the aerial bombs during the specific incidents were launched by the SRK.
312. The Appellant considers that the Chamber reached these findings based on the finding in paragraph 107 whereby only the SRK had aerial bombs,⁵⁶⁸ which is challenged by the Appellant,⁵⁶⁹ contrary to what it says in paragraph 108 of the Judgement, and based on the expertise of W15 regarding the length of aerial bomb trajectories.⁵⁷⁰ In fact, bombs that fly more than 5 km were not seen on the territory of Sarajevo.⁵⁷¹ What was seen were bombs that flew only about 100 metres before they exploded or that exploded when they were being launched.⁵⁷²
313. The Appellant considers that the Chamber committed an error of law by basing itself on facts that it did not determine beyond a reasonable doubt, i.e. that the SRK alone had aerial bombs and the distance that these bombs could theoretically reach, when determining the origin of projectiles that exploded during the specific incidents. It consequently committed errors of fact in paragraphs 443, 508, 521, 533, 539, 552, 561, 640, 652 and 669.

⁵⁶⁶ P586, page 112 and photos, page 113.

⁵⁶⁷ T. 9153/17 to 9154/1 (T18, 23 August 2007).

⁵⁶⁸ Paragraphs 443, 492, 507, 521, 531, 538, 551, 561, 621, 640, 652 and 668 of the Judgement.

⁵⁶⁹ Paragraphs 288 to 306 of the Brief.

⁵⁷⁰ Paragraphs 443, 508, 521, 533, 539, 552, 561, 640, 652 and 669 of the Judgement.

⁵⁷¹ With the exception of Witness W19, but the Appellant challenges his testimony.

⁵⁷² T. 5145/17 to T. 5158/20 (W163, 25 April 2007) and T. 5800/20 to 5801/14 (T62, 29 May 2007).

314. The Chamber avoided determining beyond a reasonable doubt other indicia likely to establish the origin of the projectiles and passed over all the ambiguities concerning the direction of fire, hiding behind the findings that: the SRK alone had aerial bombs and bearing in mind the distance that these bombs can cover, SRK territory was within this distance. This is not the case, however, since it ensues from the evidence that there were ABiH combat positions at all distances from the explosion sites in certain directions and even at distances that correspond to those indicated by W15, Igman in particular.⁵⁷³
315. In paragraph 519 of the Judgement, the Chamber committed an error by finding that the projectile was an aerial bomb, while evidence does not prove it beyond a reasonable doubt. In paragraph 516, the Chamber cites the Bosnian police report that concludes that an aerial bomb explosion was possible, which should have been corroborated by other evidence, but was not.
316. In paragraph 661 of the Judgement, the Chamber's procedure is identical to that in paragraph 519 of the Judgement, and the Appellant challenges it as well.
317. In paragraph 652 of the Judgement, the Chamber found that there was an aerial bomb explosion, even though no shrapnel was found on the site by the Bosnian police. The Chamber seems to have made these findings based on the presence of rockets⁵⁷⁴ at the explosion sites, while according to W15, even during the explosion of an aerosol bomb, a certain number of fragments must be present.⁵⁷⁵ Witness Vekaz Turković testified about the total lack of shrapnel during the incident of 23 July 1994. Nevertheless, in paragraph 635 of the Judgement, the Chamber explains his testimony by what he said about the incident of 1 July 1994, during which there were a small number of fragments.

12th GROUND OF APPEAL

⁵⁷³ See map P194.

⁵⁷⁴ Paragraph 650 of the Judgement.

⁵⁷⁵ T. 4946/4 to 4947/18 (W15, 23 April 2007).

No reasonable Chamber would have reached the findings contained in paragraphs 961 to 979 and 999 to 1001 of the Judgement:

318. The Appellant challenges the factual findings made in these paragraphs for the reasons set out in the first part of the Brief. Nevertheless, with regard to the Chamber's finding that the Appellant ordered attacks against civilians, it must be noted that no such order is to be found among the evidence. In paragraph 964, the Chamber mentions documents P225 and P226. Reading these documents, it cannot be concluded that the Appellant ordered an attack against the civilian population, if one knows the military situation in Hrasnica and its surroundings. The term "city centre" used does not mean "civilian population". The ABiH transformed the city centre of Hrasnica as well as all other neighbourhoods in Sarajevo under its control, into military zones, from which its units acted against the SRK.⁵⁷⁶ Furthermore, the Appellant always ordered the units under his command to strictly respect the norms of humanitarian law and the norms of the law of war.⁵⁷⁷

PURSUANT TO THE ABOVE

Quash the decisions made by the Chamber on 23 July 2007 and 20 July 2007.

Quash the Judgement rendered on 12 December 2007 by the ICTY Chamber.

Deliver the acquittal of Mr Dragomir Milošević.

(26,657 words /original/)

Lead Counsel
Branislav TAPUŠKOVIĆ

/signed/

Co-Counsel
Branislava ISAILOVIĆ

/signed/

Done this fourteenth day of August 2008
in Belgrade (Serbia)

⁵⁷⁶ Paragraphs 42 to 99 of the Brief.

⁵⁷⁷ Paragraph 41 of the Brief.