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The Protection of Civilians in War: The ICTY's *Galić* Case

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Abstract
This note examines the ICTY's judgement of 5 December 2003 in the case *Prosecutor* v. *Stanislav Galić*. It provides a general overview of the facts of the case and then reviews the chamber's discussion of the two war crime charges – attack on civilians and terror against civilians – and of the individual criminal responsibility of the defendant.

Key words
attack on civilians; infliction of terror on civilians; 'ordering' as a mode of individual criminal responsibility; principle of legality; principle of proportionality; subject-matter jurisdiction

1. Introduction

On 5 December 2003 Trial Chamber I[1] of the International Criminal Tribunal for the former Yugoslavia (ICTY) delivered the judgement in the case of *Prosecutor* v. *Stanislav Galić*.[2] This case concerned one of the most notorious episodes of the war in Bosnia and Herzegovina, the siege of its capital, Sarajevo, between 1992 and 1994, by the Sarajevo Romanija Corps (SRK), a component of the Bosnian Serb army.[3] General Galić, the then commander-in-chief of the SRK, stood trial accused of having conducted a protracted campaign of sniping and shelling attacks on civilians with the primary purpose of spreading terror among the civilian population of Sarajevo. The campaign was said to have resulted in the death or injury of thousands of civilians.[4]

Galić was charged with both direct and command responsibility under Articles 7(1) and 7(3) respectively of the ICTY Statute for the crimes of 'infliction of terror' and attack on civilians as violations of the laws or customs of war, and of murder and inhumane acts as crimes against humanity. The chamber found Galić guilty on five counts of terror, murder, and inhumane acts. These convictions were entered unanimously, except for the 'crime of terror', where one judge dissented. The chamber by a majority imposed a sentence of twenty years' imprisonment for these crimes.

* Associate Legal Officer, Chambers, International Tribunal for the former Yugoslavia. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the International Criminal Tribunal for the former Yugoslavia or the United Nations in general.
1. Judges Alphosus Orie (Presiding), Amin El Mahdi, and Rafael Nieto-Navia.
2. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 Dec. 2003 (Judgement).
3. *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-I, Indictment, 26 March 1999 (Indictment), para. 4.
4. *Ibid.*

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After a brief overview of the factual issues of the case, this article assesses the *Galić* judgement in relation to its discussion of the war-crime charges and of Galić's criminal responsibility.

2. Factual overview

As noted above, the prosecution set out to make a wide-ranging case against the defendant, aimed at proving the existence of a campaign of attacks against the civilian population of Sarajevo. In two schedules to the indictment, it set forth 'a small representative number of individual incidents for specificity in the pleading'.[5] The chamber understood the term 'campaign' in this context to 'cover military actions in the area of Sarajevo during the indictment period involving widespread or systematic shelling and sniping of civilians resulting in their death or injury'.[6] It further interpreted the specific allegations in the schedules to the indictment to exemplify the overall situation of sniping and shelling on civilians.[7] The chamber referred to these incidents as 'scheduled' sniping and shelling incidents. It drew attention, however, to the fact that, on the basis of the examples provided by the prosecution (24 sniping attacks and five shelling attacks),[8] it would be implausible to find that, if spread out over a period of two years, such attacks would convincingly amount to a 'widespread' or 'systematic' manifestation of sniping and shelling of civilians. Thus in moving from the level of the specific incidents of shelling and sniping to the level of the general campaign, the chamber examined whether each individual scheduled incident was representative of the alleged campaign of sniping and shelling.[9] At the same time it took account of 'unscheduled' or more general evidence of attacks experienced by the civilian inhabitants of Sarajevo which demonstrated that the proved scheduled incidents were not isolated events.[10] The chamber later examined whether these attacks were carried out with the purpose of inflicting terror.[11]

In determining whether the specific scheduled incidents constituted examples of a campaign, the chamber examined in each case whether the victims were deliberately targeted as civilians and whether the source of fire was in SRK-held territory. It is worth noting that the identity of the actual perpetrator(s) of the individual sniping and shelling attacks remained unknown. The chamber was, however, able to attribute responsibility to the SRK for the sniping incidents by relying on inferences drawn from evidence such as the distance between the victim and the most probable source of fire, the distance between the location where the victim was hit and the SRK confrontation line, the existence of an unobstructed line of sight

5. Judgement, *supra* note 2, paras. 3, 186–7; Indictment, *supra* note 3, para. 15. The first schedule refers to sniping incidents allegedly committed against civilians by SRK forces. The second schedule lists a number of shelling incidents.
6. Judgement, *supra* note 2, para. 181.
7. *Ibid.*, para. 188.
8. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on Motion for Entry of Acquittal of the Accused Stanislav Galić, 3 Oct. 2002, para. 33.
9. Judgement, *supra* note 2, para. 188.
10. *Ibid.*, paras. 189, 207–8.
11. *Ibid.*, paras. 564–77.

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between these two locations, and the existence of a pattern of SRK sniping fire in the area where the incident occurred. When examining the shelling incidents, the chamber assessed more technical evidence on issues such as the angle of descent and penetration of the mortar shell(s), and the direction and the range of firing, in order to establish whether the shell(s) originated from territory under the control of the SRK. A noteworthy example of such analysis concerns the shelling of Markale market on 5 February 1994 (shelling incident no. 5), a pivotal event in the conflict in Sarajevo and a major point of focus in this case. The majority examined the technical data on this incident at length and found that the mortar which struck the market had been deliberately fired from SRK-controlled territory.[12] Judge Nieto-Navia, on his part, found that, on the basis of the evidence, it was not possible to determine beyond reasonable doubt that the shell in question was aimed at Markale market.[13]

The chamber by a majority concluded by finding the existence of a campaign of sniping and shelling attacks against civilians carried out with the purpose of inflicting terror on the civilian inhabitants of Sarajevo.[14]

3. Terror and attack on civilians as war crimes

The two war-crime charges in the indictment, attack on civilians and infliction of terror, were brought under Article 3 of the ICTY Statute as violations of Article 51(2) of Additional Protocol I (API) and Article 13(2) of Additional Protocol II to the 1949 Geneva Conventions.[15] Both provisions state in identical terms that

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

Since conduct of the type charged by the prosecution is not mentioned in the Statute itself, the chamber began its discussion by examining whether it had jurisdiction over each offence. It considered the four '*Tadić* conditions',[16] which, according to the Appeals Chamber, must be fulfilled in order for an offence to fall within the scope of Article 3 of the Statute. It further set out the elements of each crime.[17]

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12. *Ibid.*, paras. 438–96.
13. Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 71–103.
14. Judgement, *supra* note 2, paras. 582–94.
15. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977.
16. The conditions the Appeals Chamber set out in the *Tadić* Jurisdiction Decision are: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995 (*Tadić* Jurisdiction Decision), para. 94.
17. Judgement, *supra* note 2, para. 12.

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3.1. Jurisdiction

The chamber held that the crime of attack on civilians had been recognized in the jurisprudence of the Tribunal as well established in customary international law.[18] In the instant case, it also has a foundation in conventional law.[19] An agreement signed by the parties to the conflict on 22 May 1992 (May Agreement) under the auspices of the International Committee of the Red Cross (ICRC) prohibited attacks on the civilian population and brought into force Articles 35–42 and 48–57 of API.[20] While this protocol regulates international armed conflicts, the chamber, which made no determination of the character of the conflict, noted that the application of API can be extended to any armed conflict by virtue of an agreement between the warring parties.[21] Therefore the chamber found that it had jurisdiction over this crime.[22]

In contrast to the offence of attack on civilians, the charge of infliction of terror against the civilian population had never before been considered as a separate offence by any international tribunal, although evidence of terrorization of civilians had been taken into account as part of other crimes.[23] The chamber by majority (Judge

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18. The chamber found that the principle prohibiting attacks on civilians reflects customary international law applicable to all armed conflicts. *Ibid.*, para. 19. See *Tadić* Jurisdiction Decision, *supra* note 16, para. 127; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, T. Ch. II, 14 Jan. 2000, para. 521. See also *Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 Nov. 2002 (*Strugar* Jurisdiction Decision), para. 10; *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Decision, T. Ch. I, 8 March 1996 (*Martić* Rule 61 Decision), para. 10; *Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amendment Indictment for Lack of Jurisdiction Based on the Limited Jurisdiction Reach of Articles 2 and 3, T. Ch. III, 2 March 1999, para. 31. The chamber further held that violations of the principle prohibiting attacks on civilians incur individual criminal responsibility under customary international law. In support of this finding, the chamber noted that an attack on civilians is criminalized as a grave breach of API, as defined in Art. 85(3)(a) of API. It further cited examples of domestic criminal codes and military manuals to indicate that violations of the principle of civilian immunity from attack are consistently sanctioned as war crimes. Judgement, *supra* note 2, paras. 29–32. See *Strugar* Jurisdiction Decision, para. 10.
19. Judgement, *supra* note 2, paras. 25, 62.
20. *Ibid.*, paras. 22–5. Paragraph 2.3 of the May Agreement specifically provided that 'The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. They shall not be made the object of attack'.
21. Judgement, *supra* note 2, para. 21. This is reflected in Common Art. 3 to the 1949 Geneva Conventions and Art. 96 of API.
22. *Ibid.*, para. 62.
23. *Ibid.*, footnote 114. In the *Čelebići* case, acts of intimidation creating an 'atmosphere of terror' in prison camps were punished as grave breaches of the Geneva Conventions (torture or inhuman treatment) and as violations of Art. 3 common to the Geneva Conventions (torture or cruel treatment). See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, T.Ch.II, 16 Nov. 1998 (*Čelebići* case), paras. 976, 1056, 1086–91, and 1119. In the *Blaškić* case, the chamber took into account 'the atmosphere of terror reigning in the detention facilities' as part of the factual basis leading to the defendant's conviction for the crimes of inhuman treatment (a grave breach) and cruel treatment (a violation of the laws or customs of law). See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, T. Ch. I, 3 March 2000 (*Blaškić* Judgement), paras. 695, 700 and 732–3. Blaškić's additional conviction for 'unlawful attack' on civilians was based in part on the finding that his soldiers 'terrorised the civilians by intensive shelling, murders and sheer violence' (*ibid.*, para. 630; also paras. 505, 511). In the *Krstić* case, General Krstić was accused of persecutions, a crime against humanity, on the basis of his alleged participation in 'the terrorising of Bosnian Muslim civilians'. *Prosecutor v. Milorad Krstić*, Case No. IT-98-33-T, Judgement, T. Ch. I, 2 Aug. 2001 (*Krstić* Judgement), para. 533; see also paras. 122, 150, 607. See also *Martić* Rule 61 Decision, *supra* note 20, paras. 23–31 (rockets were used not to strike a military target but to terrorize the civilian population of Zagreb contrary to the rules of international law); and *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, T.Ch. I, 2 Dec. 2003, para. 38. It is worth noting that the Special Court for Sierra Leone has issued several indictments charging 'terrorizing the civilian population' under Art. 3 common to the Geneva Conventions and Additional Protocol II. See http//www.sc-sl.org.

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Nieto-Navia dissenting) found that Article 3 of the ICTY Statute gave the Tribunal jurisdiction over the crime of terror[24] as charged (killing and wounding civilians in time of armed conflict with the intent to inflict terror) although without expressing itself on whether an offence of terror in a general sense fell within the jurisdiction of the Tribunal.[25] The majority held that Article 51(2) of API, which had been given effect by the May Agreement, was the legal basis of the crime of terror.[26] It took no position on whether the protocol's prohibition was also binding on the parties by virtue of customary international law.[27] In this it relied on a ruling of the Appeals Chamber in the *Tadić* Jurisdiction Decision, where it was held that the Tribunal was

> authorized to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.[28]

The majority observed that the first point stemmed 'from the unqualified imperative of respect for the *nullum crimen sine lege* principle'.[29] In the present case this principle was not transgressed, according to the majority, because the relevant provisions of API had undoubtedly been brought into effect by the May Agreement.[30] With regard to the second point, the majority took the view that 'the prohibition against terror [in Article 51(2)] is a specific prohibition within the general prohibition of attack on civilians'.[31] The specific prohibition protects the same value as the general prohibition. Thus, the majority held, 'by exemplifying and therefore according with the general norm, the rule against terror neither conflicts with nor derogates from peremptory norms of international law'.[32] To support its finding further, the majority referred to the *travaux préparatoires* of API to demonstrate the general condemnation of 'the strategy of terrorizing civilians' as a method of warfare and the wide acceptance of Article 51(2) expressed at the time of its adoption.[33]

The majority also examined whether a serious violation of the prohibition against terror of the civilian population entails individual criminal responsibility.[34] It found,

24. The chamber considered that 'infliction of terror' was not the appropriate designation of this crime, as the actual infliction of terror was not among its constitutive elements. It thus referred to this offence as 'the crime of terror against the civilian population', or simply as 'the crime of terror'. Judgement, *supra* note 2, para. 65.
25. *Ibid.*, para. 87.
26. *Ibid.*, paras. 94–6.
27. *Ibid.*, para. 97.
28. *Ibid.*, para. 98. See also *Tadić* Jurisdiction Decision, *supra* note 16, para. 143.
29. Judgement, *supra* note 2, para. 98.
30. *Ibid.*
31. *Ibid.* The ICRC Commentary to this provision states in this respect that 'Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population'. Y. Sandoz, C. Swinarski, and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross (1987)(ICRC *Commentary*), para. 4785.
32. Judgement, *supra* note 2, para. 98.
33. *Ibid.*, paras. 99–105.
34. *Ibid.*, paras. 113–28.

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after extensive review, that the intent to spread terror had already been criminalized by 1992.[35] Rather than presenting its analysis under customary international law, the majority limited its review to national and international developments to illustrate that acts of terror against civilians in war had been criminalized such that these acts entailed individual criminal responsibility.[36] It referred to domestic case law and legislation since 1919 punishing acts of 'systematic terrorism' against civilians as a war crime.[37] It also found that the protection of civilians in the hands of a party to the conflict against measures of intimidation or 'terrorism', provided for by Article 33 of the 1949 Geneva Convention IV, was elaborated and extended by Article 51(2) of API to apply to the context of the conduct of hostilities.[38] Citing military and criminal regulations from the former Yugoslavia, the majority concluded that the alleged violations were 'subject to penal sanction in 1992, both internationally and in the region of the former Yugoslavia including Bosnia and Herzegovina'.[39]

Judge Nieto-Navia, however, was of the view that the signing of the May Agreement was not sufficient to satisfy what in his view was 'the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law'.[40] He cited a report submitted by the UN Secretary-General to the Security Council regarding the establishment of the Tribunal, which stated that 'the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise'.[41] Judge Nieto-Navia sought further support in an Appeals

35. *Ibid.*, para. 129.
36. *Ibid.*, para. 113.
37. *Ibid.*, paras. 116–8.
38. *Ibid.*, paras. 119–20. It should be noted that the majority's analysis was limited to the prohibition of terror against the civilian population in times of war, as given expression in treaties of international humanitarian law: the Fourth 1949 Geneva Convention and the Additional Protocols. The majority was thus not concerned with international developments concerning other forms of terrorism. Although the notion of 'terrorism' is often limited to non-state actors, in its broadest sense terror has been considered part of warfare. In this sense, the prohibition in Art. 51(2) of API bans attacks carried out by states engaged in armed conflict to instil terror in the civilian population of an opposing warring party. It should be noted further that there is at present no universal treaty which prohibits 'terrorism' in all circumstances or provides a comprehensive definition of this term. The first attempt at an elaboration of such a treaty was the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, 19 LNOJ 23 (1938), which never entered into force. Over the last decades the international community has adopted different treaties dealing with specific aspects of terrorism, such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, (1963) 2 ILM 1042; the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, (1974) 13 ILM 41; the 1979 International Convention Against the Taking of Hostages, (1979) 18 ILM 1460; 1997 International Convention for the Suppression of Terrorist Bombings, (1998) 37 ILM 249; 1999 International Convention for the Suppression of the Financing of Terrorism, (2000) 39 ILM 270; and Convention on the Suppression of Acts of Nuclear Terrorism (in process of negotiation), UN Doc. A/C6/53/L4, Annex I (1998). At a regional level, several relevant instruments have also been adopted, such as the 1977 European Convention on the Suppression of Terrorism and the 2002 Inter-American Convention against Terrorism.
39. Judgement, *supra* note 2, paras. 121–3, 129.
40. Separate and Partially Dissenting Opinion of Judge Nieto-Navia, para. 113.
41. *Ibid.*, para. 109. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 34.

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Chamber decision in the *Ojdanić* case, in which it was held that

> the scope of the Tribunal's jurisdiction *ratione materiae* may ... be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[42]

In his view the chamber was required to demonstrate the existence of the crime of terror under customary international law before finding that it could be brought under Article 3 of the Statute, and it had failed to do so.[43]

The criticisms by Judge Nieto-Navia in relation to the findings of the majority merit further comment. It should be noted that the reference made by the Secretary-General to the principle of *nullum crimen sine lege* in his report concerned a limitation on the applicable law and competence of the Tribunal, and was intended to ensure that the Tribunal would neither exceed the limits of existing international law nor create new law. In the *Tadić* Jurisdiction Decision, the Appeals Chamber stated that the 'only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty'.[44] With regard to the scope of Article 3 of the Statute, the Appeals Chamber further held that it covers all violations of humanitarian law, including 'violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law'.[45] It found that the Tribunal is therefore authorized to apply, in addition to customary law, conventional law, provided that the two conditions examined above by the majority are met: that it is unquestionably binding upon the parties and does not conflict with or derogate from a rule of peremptory character.[46] There is further nothing in this Appeals Chamber decision that requires both a conventional basis and a customary one for an incrimination where conventional law is relied on. To date, the *Tadić* Jurisdiction Decision has not been overturned. Thus, in finding that Article 51(2) of API *qua* conventional law was the legal basis of the crime of terror, the majority was merely applying the standing ruling of the Appeals Chamber in the *Tadić* Jurisdiction Decision.[47]

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42. Separate and Partially Dissenting Opinion of Judge Nieto-Navia, para. 110. See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (*Odjanić* Decision on Jurisdiction), para. 9.
43. Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 112–113.
44. *Tadić* Jurisdiction Decision, *supra* note 16, para. 143.
45. *Ibid.*, para. 89.
46. *Ibid.*, para. 143.
47. The majority's approach on this point finds support in the interpretation of the *Tadić* Jurisdiction Decision provided by previous chambers. See, e.g., *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, T.Ch. III, 26 Feb. 2001 (*Kordić and Čerkez* Judgement), para. 167 ('Article 3 covers violations which are not only custom-based, but also treaty-based. It is settled that the International Tribunal also has jurisdiction over violations which are prohibited by international treaties'); *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, T.Ch. II, 10 Dec. 1998 (*Furundžija* Judgement), para. 135 ('Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the *Tadić* Jurisdiction Decision, these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them').

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It should be observed, however, that it has been the practice of the Tribunal, when called on to determine whether a crime falls within its jurisdiction, to ascertain that it exists under customary law.[48] In this respect it is necessary to mention that while the majority took no position on whether a customary basis exists for the crime of terror, its review of state practice satisfies the rigours of a customary-law analysis.[49] Of particular relevance is the fact that the majority considered not only international developments on the criminalization of terror attacks against civilians, but also penal codes and military manuals of the former Yugoslavia to illustrate that the crime charged was subject to sanction in this region. Judge Nieto-Navia's dissent on this issue is thus misconceived.

Finally, it should be noted that the *nullum crimen* principle intends to protect a fundamental right that nobody can be prosecuted and convicted for acts not based on a norm that existed at the time the acts or omissions with which he or she is charged were committed. This principle is respected where it is demonstrated that the conduct charged existed as a form of liability in legal norms (either of national or international character) in a sufficiently accessible way, and that it was sufficiently foreseeable to the perpetrator that the conduct in question warranted a criminal conviction at the time when the crime was allegedly committed.[50] In the present case, the majority clearly demonstrated in its analysis of the crime of terror that General Galić could not have possibly ignored the fact that attacking civilians committed with the purpose of inflicting terror was clearly defined as a criminal offence by the law, including that of the former Yugoslavia, and that he was subject to such legal provisions. Moreover, even if such domestic provisions had not existed, given the fundamental character of the principle which is at the core of this crime, namely that of protection of civilians from attacks, and given the consistent practice of punishing violations of this principle under customary international law, any individual would reasonably be expected to have sufficient notice that an infringement of this principle could entail his criminal responsibility.

3.2. Elements of the crimes

3.2.1. Attack on civilians

Prior to the *Galić* judgement, in only two cases had the offence of attack on civilians been defined in the jurisprudence of the Tribunal. At the time of writing, no Appeals Chamber judgement has touched on the question of the required elements of this crime.

In the *Blaškić* case, the chamber held as follows.

> As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population or damage

48. See, e.g., *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, T. Ch. II 29 Nov. 2002, paras. 193 et seq.; *Prosecutor v. Krnojelac*, IT-95-25-T, Judgement, T. Ch. II, 15 March 2002, paras. 177 et seq., paras. 350 et seq.; *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-T, Judgement, T. Ch. II, 22 Feb. 2001, para. 518 et seq.; *Čelibići* Judgement, *supra* note 25, paras. 414–418; *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Appeal Chamber Judgement, 12 June 2002, paras. 124, 146–8.
49. See Judgement, *supra* note 2, paras. 114–29.
50. See *Odjanić* Decision on Jurisdiction, *supra* note 42, paras. 37–8.

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> to civilian property. Targeting civilians or civilian property is an offence when not justified by military necessity. Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces . . . Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.[51]

This approach was later adopted by the chamber in the *Kordić and Čerkez* case. It found that prohibited attacks 'are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.'[52]

The *Galić* chamber expressly departed from this jurisprudence, stating that the prohibition in Article 51(2) does not contemplate derogation by invoking military necessity.[53] On its interpretation of the Article, and 'in the light and ordinary meaning of the terms of Additional Protocol I, as well as of its spirit and purpose',[54] the chamber held that the crime of attack on civilians is constituted of

> acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities, causing death or serious injury to body or health within the civilian population.[55]

As regards the *actus reus*, it should be noted that the term 'attack' as defined in Article 49 of API means 'acts of violence against the adversary, whether in offence or in defence'. The accepted definition of 'civilian' is that of Article 50 of API, which defines the term negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. A person is considered to be a civilian 'for as long as there is doubt as to his or her real status'.[56]

The chamber's definition of the crime of attack on civilians followed previous jurisprudence insofar as it required a result, that is, that the attack causes *death or*

51. *Blaškić* Judgement, *supra* note 23, para. 180.
52. *Kordić and Čerkez* Judgement, *supra* note 47, para. 328.
53. Judgement, *supra* note 2, para. 44. The Chamber understood that military necessity, in the broad sense, meant 'doing what is necessary to achieve a war aim' (ICRC, *Dictionary of International Law of Armed Conflict*, 1992). It emphasized that 'The principle of military necessity acknowledges the potential for unavoidable civilian death and injury ancillary to the conduct of legitimate military operations. However, this principle requires that destroying a particular military objective will provide some type of advantage in weakening the enemy military forces. Under no circumstance are civilians to be considered legitimate military targets. Consequently, attacking civilians or the civilian population as such cannot be justified by invoking military necessity' (Judgement, *supra* note 2, n. 76.)
54. Judgement, *supra* note 2, para. 46.
55. *Ibid.*, paras. 56, 62.
56. *Ibid.*, para. 50. See Art. 50(1) of API. The Commentary to API explains that the presumption of civilian status concerns 'persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.' ICRC,*Commentary*, *supra* note 31, para. 1920. The chamber considered that factors such as clothing, activity, age, or sex of a person are among those to be considered in deciding whether a person is a civilian. In the understanding of the chamber, 'a person shall not be made the object of an attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant'. Judgement, *supra* note 2, para. 50. E.g, when examining a scheduled sniping incident, the chamber found that 'the clothing of the victim, the activity she was engaged in (riding a bicycle), the fact that she was unarmed, were indicia of [the victim's] civilian status and would have put a perpetrator on notice of her civilian status'. *Ibid.*, para. 358.

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serious bodily injury to body or health within the civilian population.[57] This formula appears to be borrowed from the *chapeau* of Article 85(3) of API, which expressly contemplates this result requirement when sanctioning, as a grave breach of the protocol, the act of wilfully making the civilian population and individual civilians the object of attack.

However, an attack on a civilian area may cause few or no casualties, for example due to a failure of the weaponry employed or because the civilian inhabitants sought shelter before the attack began. In such cases is the result element necessary for the crime of attack on civilians to have been committed? In other words, does the grave breach threshold have to be met in order to punish an attack on civilians as a war crime?

In this respect, it is relevant to note that, in contrast to the ICTY jurisprudence (and to Article 85 of API), the offence as defined in Article 8(2)(b)(i) of the ICC Statute, which deals with the war crime of intentionally attacking civilians, does not contain a 'result element'. This issue was the subject of much debate at the diplomatic conference in Rome.[58] During the ensuing debates, a minority was of the view that the grave breach threshold should be applied. The majority of delegations, however, adopted the proposal of the Swiss delegation, which suggested that a result was not necessary. This approach reflects the intention to sanction 'the overall wrong of this crime, that is, an attack directed against protected persons, and not any actual damage'.[59]

The *Galić* chamber touched on this issue, but only to exclude examination of the question, since it considered it to be a matter that went beyond the scope of the case, which concerned only the killing and wounding of civilians.[60] It decided to leave open the question of 'whether attacks resulting in non-serious civilian casualties, or in no casualties at all, may also entail the individual criminal responsibility of the perpetrator'.[61] It therefore did not pronounce itself on whether such attacks, although not amounting to a grave breach, could be considered under the charge of attack on civilians and as falling within the jurisdiction of the Tribunal.

The mental requirement for the fulfilment of the crime derives from the *chapeau* of Article 85(3) of API, that is, 'wilfully'. The chamber interpreted the term 'wilfully' in the same way as the ICRC Commentary, which states:[62]

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

57. *Ibid.*, para. 43.
58. See for further discussion K. Dörtmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary* (2003), 130; D. Frank, 'Article 8(2)(b)(i) – Attacking Civilians', in R. Lee *et al.* (eds.), *ICC: Elements of Crimes and Rules of Procedure and Evidence* (2001), 141–2.
59. Frank, *supra* note 58, at 142.
60. Judgement, *supra* note 2, para. 43.
61. *Ibid.*, para. 43.
62. ICRC, *Commentary*, *supra* note 31, para. 3474.

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The chamber held that this notion includes both direct intent and recklessness, while excluding mere negligence.[63]

The consequence of this interpretation is that it broadens the scope of the crime to encompass not only attacks directed against civilians as such, but also situations where attacks are carried out without taking necessary precautions to spare the civilian population or individual civilians (in the sense of Article 57 of API). This offence would thus cover, for example, situations where the attacker failed to seek precise information on the intended target.

It is worth noting that the prosecution submitted as one of the elements of the crime that 'the civilian status of the population or of individual persons killed or seriously injured was known or should have been known to the perpetrator'.[64] Although the chamber did not retain this additional mental element in its definition, it did refer to the degree of knowledge required as to the status of the victim. It held that in order to prove the *mens rea* for a charge of attack on civilians, the prosecution must show that 'the perpetrator was aware of the civilian status of the persons attacked'.[65] In cases of doubt as to their status, 'the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant'.[66]

When examining the scheduled sniping incidents, the chamber addressed the issue of the degree of knowledge required as to the status of a victim. To determine whether the perpetrator could have reasonably ascertained the non-combatant status of the individual(s) targeted, the chamber took into account factors such as the distance of the victim(s) from the alleged perpetrator(s),[67] the visibility at the time of the event,[68] and the proximity of the victim(s) to possible military targets.[69] In one instance, the majority found that shots fired after dark from SRK-controlled

63. Judgement, *supra* note 2, para. 54.
64. *Ibid.*, para. 34.
65. *Ibid.*, para. 55.
66. *Ibid.*, para. 55.
67. E.g., the chamber held that at a distance of 200 metres 'the age, the activity and the way the girls were dressed could not be ignored by the perpetrator. Their civilian status was thus obvious for anyone located at such a short distance.' Judgement, *supra* note 2, paras. 320–1. In another instance, it found that, at a distance of 1100 metres, 'the perpetrator would have been able to observe the civilian appearance of [the victim], a 48-year-old civilian woman [and that she was engaged in a civilian activity, i.e. fetching water], if he was well equipped; ... if no optical sight or binoculars had been available, the circumstances were such that disregarding the possibility that the victim was civilian was reckless'. *Ibid.*, para. 355.
68. In one sniping incident, the chamber found that, at 6 a.m., 'the person firing at [the victim could have] failed to notice that she was a middle-aged civilian woman carrying wood. Nonetheless, the Majority is satisfied that the absence of military presence in the area of the incident, which consisted of open space except for three nearby houses, should have cautioned the perpetrator to confirm the military status of his victim before firing'. *Ibid.*, para. 522.
69. With respect to one sniping incident, the chamber was not satisfied that the victim's status of civilian was reasonably clear to any armed force, despite the fact that the victim was in civilian clothes and was not openly carrying arms. The chamber found that 'the incident occurred in the 'early morning hours, ... although there was no fighting in the area, the area was full of troops. The evidence also shows that there was a check-point in the vicinity of the incident. Because it is reasonably possible that, in view of the location of the victim and other conditions such as the presence of troops and a check-point in the vicinity, SRK forces reasonably considered [the victim] to be an enemy soldier advancing toward the front line, the Trial Chamber is left with some doubt as to whether [the victim] was deliberately targeted as a civilian. Therefore, the Trial Chamber cannot conclude beyond reasonable doubt that [the victim] was deliberately targeted as a civilian and cannot consider this incident as representative of a campaign of fire against civilians'. *Ibid.*, para. 557. See also *ibid.*, paras. 428–429.

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territory at a candle-lit window in a civilian apartment block, resulting in the death of a civilian, constituted an example of an attack against civilians, as it was carried out with the intention to kill or to seriously injure any civilian present in the candle-lit room.[70]

Lastly, when considering the *actus reus* of the offence of attack on civilians the chamber examined the principle of proportionality. This principle, embodied in Articles 51(5)(b) and 57(2)(a)(iii) of API, requires those preparing an attack on a military objective to consider whether the attack may be expected to cause 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated', since such attacks are unlawful. The chamber took the view that attacks carried out in violation of the principle of proportionality 'may give rise to the inference that civilians were actually the object of attack' and may thus fall within the scope of the crime. In so proceeding it conflated two distinct types of criminal conduct into one and the same offence. By contrast, Article 85(3)(b) of API prohibits disproportionate attacks as a separate offence.[71] Moreover, the ICRC *Commentary* explains regarding this provision that 'the attacks concerned here are *not* those directly aimed at the civilian population or individual civilians, but attacks affecting them incidentally'.[72] A different *mens rea* element is required, namely that the attack was launched wilfully against a military objective and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.[73] This *mens rea* does not cover attacks that, through recklessness, result in civilian casualties, but only situations where the perpetrator knew with certainty that, in attacking a military target, excessive incidental civilian loss would ensue.[74] It is thus difficult to understand why the chamber considered that disproportionate attacks come within the definition of the crime of attack on civilians.

The question of the proportionality of an attack was examined only once in the judgement with respect to a shelling incident (shelling incident no. 1), which concerned a football match at a parking lot in the neighbourhood of Dobrinja.[75] According to the evidence, off-duty ABiH soldiers were present at the match. Rather than concluding that the attack on the crowd present at the game violated the principle of proportionality, the majority of the chamber reasoned as follows.

> The Majority understands the evidence to show that there were soldiers present at the parking lot, who were off-duty, unarmed and not engaged in any military activity. It

70. The majority found that the shots fired into victim's apartment were not stray bullets but were deliberately aimed at the window of the apartment. Taking into account the fact that there were no soldiers inside or in the proximity of the building and no combat activity was under way at the time, the majority said that 'the attacker should have known that, by deliberately targeting a window (with a light) of an apartment in a residential block of flats, only civilian casualties would result'. *Ibid.*, paras. 283–4.
71. Art. 85(3)(b) of API prohibits the act of 'launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)'. It is worth mentioning that these two types of attacks have also been considered as distinct crimes in Arts. 8(2)(b)(i) and (ii) of the ICC Statute.
72. ICRC, *Commentary*, *supra* note 31, para. 3477 (emphasis added).
73. Judgement, *supra* note 2, para. 59. See Art. 85(3)(a) of API.
74. See ICRC *Commentary*, *supra* note 31, para. 3477.
75. Judgement, *supra* note 2, paras. 372–87.

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> finds that, although soldiers were present at the improvised football pitch, the crowd gathered there was carrying out a civilian activity, i.e., playing football ... Had the SRK forces launched two shells into a residential neighbourhood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area. The Majority notes that there is no evidence on the Trial Record that suggests that the SRK was informed of the event taking place in the parking lot. However, had the SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had [they] intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, *would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.* In light of its finding regarding the source and direction of fire, and taking account of the evidence that the neighbourhood of Dobrinja, including the area of the parking lot, was frequently shelled from SRK positions, the Majority finds that the first scheduled shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area.[76]

The chamber thus understood that attacks carried out in violation of the principle of proportionality constituted a type of indiscriminate attack.

3.2.2. *The crime of terror*

The crime of terror was defined by the majority as

> acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population with the primary purpose of spreading terror among the civilian population.[77]

Except for the 'primary purpose' of terror, the other legal elements of the crime are the same as those of attack on civilians.

The majority said that terror requires proof not only that the perpetrator 'was aware of the possibility that terror would result from the illegal acts', but also that that was the result he or she specifically intended.[78] The mental element excludes *dolus eventualis* or recklessness.[79]

The majority found that actual infliction of terror is, however, not a constitutive element of the crime. As a result, the prosecution is not required to prove a causal connection between the acts of violence and any terror actually experienced by the

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76. See *ibid.*, paras. 386–7 (emphasis added).
77. *Ibid.*, paras. 133, 138.
78. *Ibid.*, para. 136. In this respect, the ICRC Commentary to this provision stated that 'the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces ... This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.' ICRC, *Commentary*, *supra* note 31, para. 1940. The fact that 'primary purpose' signifies specific intent is also borne out of the *travaux préparatoires* of Art. 51(2) of API, where it was noted 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', (1974–77) XV *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, at 274.
79. Judgement, *supra* note 2, para. 136.

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civilian population; it need only be proved that the perpetrator *intended* that the targeted population would be terrorized.[80]

4. GALIĆ'S CRIMINAL RESPONSIBILITY

It has been established in the jurisprudence of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) that 'ordering' means 'a person in a position of authority using that authority to instruct another to commit an offence'. The order does not need to be given in any particular form, and may be proved through direct or circumstantial evidence.[81]

The chamber by majority found Galić responsible under Article 7(1) of the Statute for having ordered his forces to conduct a campaign of attacks against civilians in Sarajevo with the aim of spreading terror among the civilian population. In reaching its conclusion the majority relied primarily on circumstantial evidence, because direct evidence of orders given by Galić was not adduced at trial. Judge Nieto-Navia, dissenting, found the defendant guilty under command responsibility pursuant to Article 7(3) of the Statute.

In its analysis of the facts relating to Galić's responsibility, the majority concluded that he had effective control over his troops[82] and knowledge of the crimes proved at trial,[83] and that he had failed to take reasonable measures to prevent or punish perpetrators of crimes against civilians.[84] The fact that Galić was the *de jure* and de facto commander of these troops during this time was not contested at trial.[85] The majority further found that the evidence demonstrated a deliberate intent to allow the situation of violence against civilians to continue.[86] However, the crux of the matter was whether Galić had not only allowed the crimes to occur, but had actually ordered their commission. To answer this question, the chamber recalled an earlier finding on the existence of a 'campaign' of attacks against civilians in Sarajevo carried out by the SRK during Galić's tenure, that is, it found that these attacks fell into a systematic pattern and were committed in a widespread and notorious fashion during an extensive period of time.[87] For example, it referred to instances of heavy, highly co-ordinated artillery fire brought to bear on the civilian population of the city, and to the increase and decrease of the levels of firing activity on the city.[88]

80. *Ibid.*, para. 134.
81. *Krstić* Judgement, *supra* note 25, para. 601. See also *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 Sept. 1998, para. 483; *Blaškić* Judgement, *supra* note 23, para. 281; *Kordić and Čerkez* Judgement, *supra* note 47, para. 388. The *Galić* chamber added that '"ordering" ... may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of operations, the modus operandi of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command'. Judgement, *supra* note 2, para. 171.
82. Judgement, *supra* note 2, paras. 659–63.
83. *Ibid.*, paras. 700–5.
84. *Ibid.*, paras. 717–23.
85. *Ibid.*, paras. 613, 615.
86. *Ibid.*, para. 722.
87. *Ibid.*, paras. 736–7.
88. *Ibid.*, paras. 734–6.

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Given the 'frequency, intensity and geographical spread' of the attacks, the chamber considered that it was not reasonable to believe that these crimes were 'not the result of a deliberate action to have the situation continue'.[89] Rather, it held that this situation could not have occurred without it being 'the will of the commander of those forces which perpetrated it'.[90] After careful analysis of the evidence adduced in relation to the pattern of shelling and sniping, the chamber concluded that these attacks were in fact ordered by the chain of command of the SRK. The chamber then drew the 'compelling inference' that Galić's substantial knowledge of the crimes committed by his subordinates against civilians, coupled with his duty to act on that knowledge and his failure to do so, 'bespeaks a deliberate intent to inflict acts of violence' with the purpose of spreading terror.[91] On the basis of these findings, the chamber determined that

> the evidence impels the conclusion that Galić, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) failed to prevent the commission of crime and punish the perpetrators thereof upon that knowledge, furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo.[92]

The majority's analysis of Galić's direct responsibility is unusual in that it began as that which typically would be conducted to establish liability under Article 7(3) of the Statute. It then proceeded to establish whether Galić was responsible for more than failure to prevent and to punish his troops for the crimes proved at trial. To move from Article 7(3) to Article 7(1) responsibility, the majority relied on circumstantial evidence, taking into account factors such as the widespread nature of the attacks committed by Galić's soldiers, the notoriety and duration of this pattern of attacks, and Galić's presence on the ground as the commander-in-chief of the SRK. Given these circumstances, and despite the lack of evidence on actual orders, the majority concluded that Galić had played an active role in furthering a campaign of attacks against civilians with the purpose of inflicting terror, and properly characterized his criminal responsibility as 'ordering'.

5. Conclusion

The most noteworthy legal development emerging from the *Galić* judgement is the recognition of the crime of terror as a war crime under Article 3 of the Statute. By establishing that this crime falls within the scope of the Tribunal's jurisdiction, the majority clarified existing international law on this subject, reaffirming the protection afforded to civilians from acts of terrorization. This development will certainly transcend the sphere of competence of the ICTY and affect the work of

89. *Ibid.*, para. 737.
90. *Ibid.*, para. 742.
91. *Ibid.*, paras. 745–6.
92. *Ibid.*, para. 749.

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other national and international tribunals that in the future will be charged with the task of prosecuting those responsible for acts of terror against civilians.

However, the majority may come under criticism for not having taken a clearer stand, when examining the question of jurisdiction, regarding the customary nature of this crime. Since the *Galić* judgement is currently under appeal, it now lies with the Appeals Chamber to determine whether, in the words of Judge Nieto-Navia, the majority 'departed from the established jurisprudence of the Tribunal' in this respect.

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