

**UNITED
NATIONS**



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

Case No. IT-01-42-A
Date: 17 July 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Judgement of: 17 July 2008

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol
Ms. Laurel Baig

Counsel for the Accused:

Mr. Goran Rodić
Mr. Vladimir Petrović

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December 1991.⁶⁶⁸ Hence, the Appeals Chamber will first examine the applicable law and then determine whether the factual conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached.

(a) Attacks on Civilians (Count 3)

270. The Appeals Chamber has previously ruled that the perpetrator of the crime of attack on civilians must undertake the attack “wilfully” and that the latter incorporates “wrongful intent, or recklessness, [but] not ‘mere negligence’”.⁶⁶⁹ In other words, the *mens rea* requirement is met if it has been shown that the acts of violence which constitute this crime were wilfully directed against civilians, that is, either deliberately against them or through recklessness.⁶⁷⁰ The Appeals Chamber considers that this definition encompasses both the notions of “direct intent” and “indirect intent” mentioned by the Trial Chamber, and referred to by Strugar, as the *mens rea* element of an attack against civilians.

271. As specified by the Trial Chamber in the *Galić* case,

For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.⁶⁷¹

The intent to target civilians can be proved through inferences from direct or circumstantial evidence.⁶⁷² There is no requirement of the intent to attack *particular* civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack.⁶⁷³ The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of

⁶⁶⁸ The Appeals Chamber notes that the Trial Chamber made legal and factual findings with respect to Count 3 (attacks on civilians) and Count 5 (attacks on civilian objects) simultaneously (Trial Judgement, paras 277 *et seq.*). Strugar has not presented any argument concerning the Trial Chamber’s findings in relation the *mens rea* element of the crime of attack on civilian objects, given that, in light of its conclusion on cumulation, the Trial Chamber did not enter a conviction under Count 5. Both parties clarified that, in their views, the *mens rea* requirement of the crime of attack on civilians and the crime of attack on civilian objects are identical (AT. 137; AT. 212).

⁶⁶⁹ *Galić* Appeal Judgement, para. 140, citing *Galić* Trial Judgement, para. 54.

⁶⁷⁰ Cf. *Commentary AP I*, para. 3474 which defines the term “wilfully” in the following way: “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.”

⁶⁷¹ *Galić* Trial Judgement, para. 55; see also *Kordić and Čerkez* Appeal Judgement, para. 48; *Blaškić* Appeal Judgement, para. 111.

⁶⁷² *Galić* Appeal Judgement, fn. 707.

⁶⁷³ *Ibid.*, fn. 709, citing *Additional Protocol I*, Article 52 (2).