



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

Case No. IT-95-11-~~AR~~61
Date: 8 March 1996
Original: ENGLISH AND
FRENCH

IN THE TRIAL CHAMBER

Before: Judge Jorda, Presiding
Judge Odio Benito
Judge Riad

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 8 March 1996

THE PROSECUTOR

v.

MILAN MARTIĆ

DECISION

The Office of the Prosecutor:
Mr. Eric Ostberg
Mr. Gregory Kehoe

I INTRODUCTION

1. The indictment presented to this Trial Chamber pursuant to Rule 61 of the Rules of Procedure and Evidence ("Rules") was initially confirmed on 25 July 1995 by Judge Jorda who, on the same day, also issued several warrants of arrest and orders for transfer. Since the warrants have not yet been executed, the accused does not fall under the authority of the Tribunal. In a decision of 13 February 1996, pursuant to Sub-rule 61 (A) of the Rules, Judge Jorda determined that, given the circumstances of the case, the reasonable period of time after which the Prosecutor shall report to the Judge on his attempts to transmit the warrants and to effect service of the indictment had long since elapsed. After having heard the Prosecutor, and after having determined that the measures taken to transmit the warrant of arrest and to serve the indictment were reasonable, in accordance with Sub-rule 61 (A) of the Rules, the confirming Judge ordered him to request that the Trial Chamber again review the indictment against Milan Martić.

2. When reviewing the indictment, the Trial Chamber must, as the initial confirming Judge did, establish that there are reasonable grounds for believing that the accused has committed one or all of the crimes charged in the indictment. The Trial Chamber has now reviewed the relevant parts of the file transmitted by the Prosecutor to the confirming Judge, as well as additional evidence presented by the Prosecutor. It also heard witnesses summoned to appear by the Prosecutor during a public hearing held on 27 February 1996. The Trial Chamber must also review the legal characterisation of the facts presented by the Prosecutor in order to determine whether its competence at this stage has been established.

3. As this Trial Chamber affirmed in its Decision of 20 October 1995 (*Nikolić* IT-94-2-R61 at paragraph 3), proceedings under Rule 61 of the Rules ensure that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and may proceed nevertheless. To this end, if the Trial Chamber is satisfied that the charges are reasonable, after it has again confirmed the indictment, it shall issue an international warrant of arrest against the accused. Furthermore, should the Trial Chamber be satisfied that failure to execute the warrants of arrest is due in whole or in part to the refusal of a State to cooperate,

the President of the Tribunal shall notify the Security Council. The review of the indictment by a panel of Judges sitting in a public hearing reinforces the confirmation decision and, when they are summoned to appear, provides the victims with the opportunity to have their voices heard and to become a part of history.

II REVIEW OF THE INDICTMENT

A. CHARGES

4. Milan Martić is accused of having knowingly and wilfully ordered the shelling of Zagreb with Orkan rockets on 2 and 3 May 1995 (counts I and III). The attacks allegedly killed and wounded civilians in the city. Milan Martić is also accused of being responsible for the shelling because of his position of authority and his alleged failure to prevent the attack or to punish the perpetrators (counts II and IV). During the hearing, the Prosecutor stated that he was presenting the latter two counts in the alternative. The shelling falls within the jurisdiction of the Tribunal pursuant to Article 3 and Article 7 (1) and 7 (3) of the Statute of the Tribunal (the "Statute").

B. COMPETENCE OF THE TRIBUNAL UNDER ARTICLE 3 OF THE STATUTE

5. During the public review of the indictment, the Trial Chamber must verify that its competence has, at this stage, been established. In this respect, the Prosecutor holds that the alleged acts fall within the jurisdiction of the Tribunal pursuant to Article 3 of the Statute which states that "the Tribunal shall have the power to prosecute persons violating the laws or customs of war". Article 3 non-exhaustively enumerates some of those violations. In its Decision of 2 October 1995 in the *Tadić* case (IT-94-I-AR72, hereinafter "Decision of the Appeals Chamber"), the Appeals Chamber stipulated that Article 3 refers to a broad category of offences, namely, all "violations of the laws or customs of war" and that the enumeration of some of these violations provided in Article 3 are merely illustrative and not exhaustive. Since the violation identified by the Prosecutor is not fully covered by paragraphs (a) to (e) of Article 3, the Trial Chamber must verify that it constitutes a violation of the laws or customs of war referred to in the Article. Since the Appeals Chamber set a certain number of

conditions for establishing the jurisdiction of the Tribunal pursuant to Article 3, the Trial Chamber must therefore be satisfied that these conditions appear to have been fulfilled at this stage.

1. Identification of Rules of International Humanitarian Law

6. According to the Appeals Chamber, the first requirement for a violation to fall within the purview of Article 3 of the Statute is that the violation must constitute an infringement of a rule of international humanitarian law. The second requirement is that the rule must be customary in nature or, if it belongs to treaty law, that the treaty was unquestionably binding on the parties at the time of the alleged offence and was not in conflict with or derogated from pre-emptory norms of international law (paragraphs 94 and 143, Decision of the Appeals Chamber).

7. This Trial Chamber must therefore identify those conventional and customary norms which underlie the charges against Milan Martić and establish that violations of those rules are subject to prosecution under Article 3 of the Statute.

8. Violations of the rules of conventional law fall within the purview of Article 3 of the Statute *qua* treaty law. The Appeals Chamber has specified that this Article must be interpreted to include violations of Additional Protocols I and II. All the States which were part of the former Yugoslavia and parties to the present conflict at the time the alleged offences were committed were bound by Additional Protocols I and II, applicable to international and non-international armed conflicts respectively. Under the terms of these additional Protocols, attacks against civilians are prohibited. Article 85 (3) (a) of Additional Protocol I provides that making the civilian population or individual civilians the object of attack constitutes a grave breach, when committed wilfully in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health. Grave breaches of Additional Protocol I constitute war crimes and are subject to prosecution under Article 3 of the Statute. Furthermore, violations of Article 51 (2), stating that “the civilian population as such, as well as individual civilians, shall not be the object of attack” and prohibiting “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population”, fall within the competence of the Tribunal under Article 3. Similarly,

violations of paragraph 6 of that same Article, which expressly prohibits “attacks against the civilian population or civilians by way of reprisals”, come within the province of the Tribunal as defined in Article 3 of the Statute. Last, in respect of Additional Protocol II, Article 13 (2) provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack”. Paragraph 1 of that same article stipulates that this rule must be observed “in all circumstances” so that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Violations of the Additional Protocol II constitute violations of the laws or customs of war and, as such, come under Article 3 of the Statute.

9. The unqualified character of the conventional rules prohibiting attacks against civilians is also underpinned by Article 60 (5) of the 1969 Vienna Convention on the Law of Treaties. This provision excludes the application of the principle of reciprocity in conventional matters, in cases of material breaches of provisions of a treaty “relating to the protection of the human person contained in treaties of humanitarian character”.

10. As regards customary law the rule that the civilian population as such, as well as individual civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts.

11. There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law (paragraph 127, Decision of the Appeals Chamber).

12. The applicability of these rules to all armed conflicts has been corroborated by General Assembly resolutions 2444 (XXIII)¹ and 2675 (XXV)², both adopted unanimously, in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, both mentioned above, prohibit attacks against the civilian population as such, as well as individual civilians. Both provisions explicitly state that this rule shall be observed in all circumstances. The Appeals Chamber reaffirmed that both articles constitute customary international law.

13. Furthermore, the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the "Martens clause". This clause has been incorporated into basic humanitarian instruments and states that "in cases not covered by (the relevant instruments), civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience". Moreover, these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.

14. It is sufficient to recall at this point that the elementary considerations of humanity are reflected in Article 3 Common to the Geneva Conventions. This provision embodies those rules of customary international law which should be observed "as a minimum" by all parties "at any time and in any place whatsoever" irrespective of the characterisation of the conflict. The prohibition to attack civilians must be derived from Common Article 3 which provides that "persons taking no active part in the hostilities ... shall, in all circumstances, be treated humanely" and which prohibits, in paragraph 1 (a), "violence to life and person, in particular, murder of all kinds, mutilation ...". Attacks against the civilian population as such or individual civilians would necessarily lead to an infringement of the mandatory

¹ G.A. Res. 2444, U.N. GAOR, 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).

² G.A. Res. 2675, U.N. GAOR, 25th Session, Supp. No. 28 U.N. Doc A/8028 (1970).

minimum norms applicable to all armed conflicts. Article 4 of Protocol II, further developing and elaborating Common Article 3, reiterates these fundamental guarantees.

15. Might there be circumstances which would exclude unlawfulness, in whole or in part? More specifically, does the fact that the attack was carried out as a reprisal reverse the illegality of the attack? The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (*Case concerning Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, merits, I.C.J. Reports 1986, paragraph 220).

16. The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675, underscoring the need for measures to ensure the better protection of human rights in armed conflicts of all types, posits that "civilian populations, or individual members thereof, should not be the object of reprisals". Furthermore, Article 51 (6) of Protocol I, mentioned above, states an unqualified prohibition because "in all circumstances, attacks against the civilian population or civilians by way of reprisals are prohibited". Although Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited

behaviour must remain so "at any time and in any place whatsoever". The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of "collective punishments" in paragraph 2(b) of Article 4 of Protocol II.

17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.

18. Last, even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law. There exists no formal provision forbidding the use of cluster bombs in armed conflicts. Article 35 (2) of Additional Protocol I prohibits the employment of "weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury". In addition, paragraph 4(b) of Article 51 of that same Protocol states that indiscriminate attacks are prohibited. These include attacks "which employ a method or means of combat which cannot be directed at a specific military objective". Last, under the terms of paragraph 5(b) of that same article, attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated.

2. Other Conditions

19. Article 1 of the Statute authorises the Tribunal "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute". The Appeals Chamber considered that, in order for a violation of international humanitarian law to fall within the jurisdiction of the Tribunal pursuant to Article 2 of its Statute, it must, in fact, be serious. The Appeals Chamber identified two criteria for evaluating "seriousness": the violation must undermine important values and it must have serious consequences for the victim or victims. In this respect, the norm which has been violated stems from elementary considerations of humanity and protects the civilian population or individual civilians from attack. The

violation of the norm thus jeopardises the survival and safety of the civilian population and, in so doing, infringes on an important value. Furthermore, it has grave consequences for the victims.

20. The Appeals Chamber also clearly stated that for a violation of a norm of humanitarian law, to fall within the jurisdiction of the Tribunal, it must involve the individual criminal responsibility of the perpetrator of the violation. The prohibition against attacking the civilian population as such or individual civilians during armed conflicts is clear, as is the resolve of States to attach to it the principle of individual responsibility. As the Appeals Chamber reaffirmed, citing the judgement of the International Military Tribunal at Nuremberg: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (paragraph 128, Decision of the Appeals Chamber). The principle of criminal responsibility, restated in Article 7 (1) of the Statute of this Tribunal, covers the person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. International law thus permits the prosecution of individuals who acted in an official capacity, as stated in Article 7 (2) of the Statute.

21. The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes. In a Decision of 16 May 1995, this Trial Chamber considered that such persons "more so than those just carrying out orders (...) would thus undermine international public order" (*Karadžić, Mladić and Stanišić*, IT-95-5-D, official request for deferral, paragraph 25). Since the criminal intent is formulated at a high level of the administrative hierarchy, the violation of the norm of international humanitarian law is part of a system of criminality specifically justifying the intervention of the Tribunal.

22. The competence of the Tribunal, subject to a contrary interpretation of the merits, in any subsequent trial, is thus established.

C. THE FACTS

23. The Trial Chamber will now review the evidence submitted in support of the indictment in order to determine whether there are reasonable grounds for believing that the accused has committed one or all of the crimes charged in the indictment. By that is meant all the evidence presented during the confirmation of the indictment and any other evidence produced by the Prosecutor after the initial confirmation or during the hearing. In addition to the written evidence, the testimony of four witnesses was heard. The testimony dealt *inter alia* with the prevailing political and military situation at the time the city of Zagreb was shelled on 2 and 3 May 1995, description of the attacks themselves, and the consequences of the attacks. Three witnesses, one of whom is an investigator in the Office of the Prosecutor, and two police officers from the city of Zagreb were heard. Finally, the features of the rocket used, including its striking force and potential for causing damage, were described by a witness who is a military expert trained in the field of weapons.

24. As regards the military and political situation prevailing at the time of the attacks on Zagreb in May 1995, there can be no question that the armed forces of the Republic of Croatia and the armed forces of the self-proclaimed Republic of Serbian Krajina were engaged in an armed conflict. It was also made clear that the armed forces of the Federal Republic of Yugoslavia supported the self-proclaimed Republic of Serbian Krajina at that time. The evidence submitted shows that on 1 May 1995, the Croatian army launched a massive attack against the territory held by the Serbs in western Slavonia, a region located directly along the Zagreb-Belgrade highway which is the main east-west artery in Croatia. During the fighting in this region of eastern Slavonia, the city of Zagreb was shelled on 2 and 3 May 1995.

25. The relevant parts of the record and the testimony heard during the hearing demonstrate that the shelling of Zagreb was ordered by Milan Martić. At the time these acts occurred, Milan Martić was the president of the self-proclaimed Republic of Serbian Krajina. Pursuant to Rule 78, paragraph 5 of the constitution of that self-

proclaimed entity, "the President commands the armed forces in times of peace and war, commands the national resistance in time of war, orders partial or general mobilisation, and organises military preparations in accordance with the provisions of the law".³ After the shelling, in television and radio interviews and in interviews with newspaper journalists, Milan Martić admitted several times that he was the person who gave the order.⁴

26. Furthermore, the facts submitted by the Prosecutor permit the inference that the shelling of Zagreb was an operation which had been planned or prepared. Admitting that he was under orders from Milan Martić, General Čeleketić announced to the press on 24 March 1995, more than a month prior to the events on which the charges are based, that should a Croatian offensive be launched, he expected to respond by targeting the "weak points", that is, "the parks of the Croatian cities". General Čeleketić added: "we know who the people in the parks are - civilians".⁵

27. Moreover, the attack on Zagreb itself does not seem to have been an isolated act because, on 3 May 1995, Milan Martić asserted that other Croatian cities, Sisak and Karlovac, had also been targeted, apparently as part of the same criminal operation.⁶

28. As regards the attacks themselves, the testimony of Sergeant Curtis, a member of the Office of the Prosecutor, and of the two police officers from Zagreb shows that on the morning of 2 May 1995, three rockets struck the centre of the city of Zagreb while three others hit a site near the civilian airport. On 3 May 1995, during the lunch hour, two rockets again fell on the centre of the city and three others on nearby neighbourhoods.⁷ Seven people died in the two attacks, more than 100 were seriously wounded, and an equal number were slightly wounded.⁸ All the testimony corroborates the assertion that none of these people was, or could be presumed to have been, performing a military duty.

³ Exhibit 4; transcript of hearing, 27 February 1996, pp. 33-34.

⁴ Transcript of hearing, pp. 47-53; exhibits 9, 10, 11, 12 and 12A.

⁵ Exhibit 5; transcript of hearing, pp. 34-37.

⁶ Transcript of hearing, p. 49; exhibits 9 and 10.

⁷ Transcript of hearing, pp. 38-39, 62-64.

⁸ Transcript of hearing, pp. 39, 64.

29. As the photographs and the video tape produced during the hearing show,⁹ there was significant physical damage which could have been much more serious. It appears both from the documents produced and the testimony heard that a high school, a children's hospital, a retirement home, and the National Academy were damaged.¹⁰ According to the witnesses, there were no military targets in the immediate vicinity. It is noted, however, that the administration building of the Ministry of the Interior was also allegedly hit during the attack of 2 May.¹¹ In addition, the witnesses emphasised that there were no military targets near the places where the civilians were killed.¹² All asserted that the number of deaths might have been much higher. The fact that there were few civilians in the streets of Zagreb during the second attack can be attributed to the climate of terror generated by the attack of the previous day. The frightened population chose to desert the streets during the lunch hour, which certainly reduced the number of casualties this type of shelling might have caused.¹³

30. The weapons expert clearly elaborated the features of the Orkan rockets and the bombs they release. From his testimony it appears that the Peoples' Yugoslav Army (JNA) developed the rockets used during the attacks on Zagreb.¹⁴ The effects of these rockets have been known for many years. The rockets in question were equipped with 288 bomblets each of which, on explosion, propels jagged bits of metal and more than 400 small steel spheres in every direction. The rockets have a range of about 50 kilometres with a lethal radius of about 10 metres. Unlike missiles which can be guided towards the desired target, these rockets are relatively inaccurate because the lateral error factor can be as much as 600 metres on either side.¹⁵ The bombs released by the rockets have a dual purpose: they can be used both as an anti-personnel weapon and as a means of inflicting damage on light artillery since they can penetrate more than 60 millimetres of steel. The military expert believed that because they are inaccurate and have a low striking force,¹⁶ the choice of the Orkan rockets for the

⁹ Exhibits 13-29.

¹⁰ Transcript of hearing, pp. 41, 53, 67, 78.

¹¹ Report on Civilian Victims of the 2-3 May 1995 Attacks on Zagreb, Ministry of Health, Centre for Disaster Management, Department of Information and Research.

¹² Transcript of hearing, pp. 43, 68.

¹³ Transcript of hearing, pp. 81, 113.

¹⁴ Transcript of hearing pp. 96-98.

¹⁵ Transcript of hearing, pp. 98-103.

¹⁶ Transcript of hearing, p. 112.

attack on Zagreb would not have been appropriate had the purpose been to damage military targets. In respect of this, the expert referred to a set of photographs¹⁷ which show minor damage to buildings in Zagreb during the attacks of May 1995. In his opinion, it is therefore reasonable to believe that attacking and terrorising the civilian population was the main reason for using such rockets. Finally, the expert stated that the rockets were launched from a region less than 50 kilometres from Zagreb controlled by the armed forces of the self-proclaimed Republic of Serbian Krajina. The region presents the type of geophysical conditions which lend themselves to this type of operation.

31. Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that there are reasonable grounds for believing that on 2 and 3 May 1995, the civilian population of the city of Zagreb was attacked with Orkan rockets on orders from Milan Martić, the then president of the self-proclaimed Republic of Serbian Krajina. The attacks killed and wounded many civilians. In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law already discussed above and fall within the jurisdiction of the Tribunal pursuant to Article 3 of the Statute.

32. The Chamber therefore is satisfied that there is reason to reconfirm all four counts of the indictment against Milan Martić and to issue an international arrest warrant against him which will be sent to all States. Furthermore, the Trial Chamber considers that the warrant of arrest must also be sent to the Multi-national Military Implementation Force (IFOR) deployed on the territory of Bosnia and Herzegovina pursuant to the Dayton Peace Agreement signed in Paris on 14 December 1995.

¹⁷ Exhibit 22 (photos F 5-11); transcript of hearing, p. 104.

III DISPOSITION

NOTING Rules 59 *bis* and 61 of the Rules of Procedure and Evidence;

NOTING the confirmation of the indictment by Judge Jorda on 25 July 1995;

NOTING the decision of 13 February 1996 in which Judge Jorda ordered that the Prosecutor submits the case to the Trial Chamber;

THE TRIAL CHAMBER, having held a public hearing on 27 February 1996 at the Seat of the Tribunal;

HAVING HEARD the submissions of the Prosecutor;

RULING unanimously,

STATES that there are reasonable grounds for believing that Milan Martić has committed the crimes charged in the indictment confirmed on 25 July 1995;

CONFIRMS all four counts as described in the said indictment;

ISSUES an international warrant of arrest for Milan MARTIĆ;

STATES that the warrant shall be transmitted to all States and, if necessary, to the Implementation Force (IFOR).

Done in French and English, the French version being authoritative



Claude Jorda,
Presiding Judge

Dated this eighth day of March 1996
At The Hague
The Netherlands

(Seal of the Tribunal)