

A. Rule 61 Decision

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** 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-I, March 8, 1996; footnotes omitted]

THE PROSECUTOR

v.

MILAN MARTIC

DECISION

[...]

I. INTRODUCTION

[...]

1. [...] [P]roceedings 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 CHARGES

A CHARGES

1. Milan Martić is accused of having knowingly and wilfully ordered the shelling of Zagreb with Orkan rockets on May 2 and 3, 1995 (counts I and III). The attacks allegedly killed and wounded civilians in the city. Milan Martić is also accused of being responsible of 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. [...]

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

1. In its Decision of October 2, 1995 in the Tadić case (IT-94-I-AR72, hereinafter “Decision of the Appeals Chamber”) [See ICTY, *The Prosecutor v. Tadić* [Part A.]], the Appeals Chamber stipulated that Article 3 [See UN, Statute of the ICTY] 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

[...]

1. *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. Articles 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.

2. 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".
3. *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.
4. 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).
5. The applicability of these rules to all armed conflicts has been corroborated by General Assembly resolutions 2444 (XXIII) and 2675 (XXV), 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 rules shall be observed in all circumstances. The Appeals Chamber reaffirmed that both articles constitute customary international law.
6. 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.
7. 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 minimum norms applicable to all armed conflicts. Article 4 of Protocol II, further developing and elaborating Common Article 3, reiterates these fundamental guarantees.

8. 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 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). [See ICJ, Nicaragua v. United States]
9. 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.
10. 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.
11. 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.

[...]

B. Trial Chamber Judgement

[Source: 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-95-11-T, 12 June 2007; footnotes omitted]

IN TRIAL CHAMBER I

PROSECUTOR

v.

MILAN MARTIC

Judgement

[...]

II. APPLICABLE LAW

A. General requirements of Article 3 of the Statute

1. Generally

1. Milan Martić is charged with the following crimes as violations of the laws and customs of war punishable under Article 3 of the Statute: murder, torture and cruel treatment, based on Article 3 common to the four Geneva Conventions of 12 August 1949 ("Common Article 3"), and attacks on civilians based on Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. [...]
2. [...] The application of Article 3 of the Statute requires a determination that a state of armed conflict existed at the time the crime was committed and that the alleged crime was "closely related" to the armed conflict. Furthermore, four conditions, known as the Tadic conditions, must be fulfilled for a crime to fall within the jurisdiction of the Tribunal.
3. 2. Existence of an armed conflict and the nexus requirement
4. An armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State." Until a general conclusion of peace or a peaceful settlement is reached, international humanitarian law continues to apply "in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".
5. Common Article 3 requires the warring parties to abide by certain fundamental humanitarian standards by ensuring "the application of the rules of humanity which are recognized as essential by civilized nations" and as such the provisions of Common Article 3 have general applicability. When an accused is charged with violation of Article 3 of the Statute, it is immaterial whether the armed conflict was international or non-international in nature.

[...]

E. Attacks on civilians

1. Milan Martić is charged with attacks on civilians, a violation of the laws or customs of war pursuant to Article 3 of the Statute (Count 19).
2. The crime of attacks on civilians is based upon Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which provide, in their relevant parts, that “[t]he civilian population as such, as well as individual civilians, shall not be made the object of attack.”
3. Article 49 of Additional Protocol I defines the term “attack” as “acts of violence against the adversary, whether in offence or in defence”. In relation to attacks on civilians, the Appeals Chamber in *Blaškić* held that there is an absolute prohibition in customary international law against the targeting of civilians. In *Kordić and Čerkez*, the Appeals Chamber held that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity”. According to Article 52(2) of Additional Protocol I only military objectives may be lawfully attacked, that is “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.
4. The prohibition against targeting the civilian population does not exclude the possibility of legitimate civilian casualties incidental to an attack aimed at military targets. However, such casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack. In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.
5. It is an element of the crime that the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks.
6. The Trial Chamber recalls that the Appeals Chamber has considered that “Article 50 of Additional Protocol I contains a definition of civilians and civilian populations”, which may largely be viewed as reflecting customary law.

[...]

III. FACTUAL FINDINGS

[...]

G. Attacks on Zagreb on 2 and 3 May 1995

1. “Operation Flash”

1. In the early morning hours of 1 May 1995, armed forces of Croatia launched a military offensive known as Operation Flash. The Trial Chamber has been provided conflicting evidence as to the purpose of this operation. There is evidence that the purpose was to take control over Western Slavonia (Sector West). There is evidence that the operation was Croatia’s response to Milan Martić’s decision to close the Zagreb-Belgrade motorway. There is also evidence that Croatia planned its attack long before the closure. Two Croatian guard brigades, one regular HV brigade, and special police forces were involved in the operation. Negotiations to find a peaceful settlement took place during the operation, and agreements were reached on 3 May 1995. Operation Flash ended around 4 May 1995 with the RSK losing control over Western Slavonia. A large part of the Serb population fled the area of Western

Slavonia.

2. Shelling of Zagreb

(a) 1 May 1995 – Preparation for attack

1. On 1 May 1995, a meeting was held between, inter alia, Milan Martić, the Chief of the SVK Main Staff General Milan Čeleketić, the Prime Minister and ministers of the RSK government. The meeting concerned the proposal of the Supreme Defence Council to deal with the situation which had arisen in Western Slavonia resulting from Operation Flash during the morning that day. The evidence shows that both peaceful solutions, involving negotiations and a surrender of parts of Western Slavonia, and non-peaceful solutions were discussed and that Milan Martić, Milan Čeleketić and the most senior officers of the SVK Main Staff were in favour of the latter. At 1300 hours on 1 May 1995, Milan Čeleketić, in the presence of inter alia Milan Martić, ordered artillery fire on Sisak, south-east of Zagreb. The evidence shows that the reason for the attack was “to retaliate against the HV who had carried out an aggression on the Western Slavonia.” Artillery fire was opened at 1700 on 1 May 1995.
2. On 1 May 1995, Milan Čeleketić ordered the M-87 Orkan unit of the SVK to “be alert and ready for engagement on [his] order” and directed them to march from the Knin area to take up positions in Vojnić, 50 kilometres south of Zagreb, by 1400 hours that day.

(b) 2 May 1995

1. In the mid-morning on 2 May 1995, without warning, Orkan rockets hit Zagreb. Rockets struck the centre of the city, [...] as well as [...] a school building [...] and the airport [...].
2. Five persons were killed during these rocket attacks. The body of Damir Dračić was found lying on the sidewalk at Vlaška Street. Ana Mutevelić was killed when a tram was hit at the intersection of Draškovićeve and Vlaška Streets. The body of Stjepan Krhen was found in the courtyard of No. 41 Vlaška Street. Ivanka Kovač died at the trauma clinic in Draškovićeve Street from the injuries she sustained some 700 metres from the hospital. Ivan Brodar was injured on Draškovićeve Street and died as a result of his injuries on 3 May 1995.
3. [...] There is evidence that in total 160 people were injured during the attack on 2 May 1995.

[...]

(c) 3 May 1995

1. At midday on 3 May 1995, Zagreb was again shelled by Orkan rockets [...].

[...]

1. The Trial Chamber finds that Luka Skračić and Ivan Markulin were killed and that 54 people were injured as a result of the shelling on 3 May 1995.

[...]

IV. RESPONSIBILITY OF MILAN MARTIĆ

[...]

B. Findings on the individual criminal responsibility of Milan Martić

[...]

4. Findings on Counts 1 and 15 to 19

[...]

(b) Military targets in Zagreb and the nature of the M/87 Orkan

1. The Defence argues that there were military targets in Zagreb at the time of the attacks on 2 and 3 May 1995, including the Ministry of Interior, Ministry of Defence, Zagreb/Plešo airport which had a military purpose, and the Presidential Palace. The Trial Chamber notes the report of 2 May 1995 from the SVK Main Staff to the VJ General Staff, which provides that the following targets in Zagreb were fired at by Orkan rockets on that day: the Ministry of Defence, the Presidential Palace and Zagreb/Plešo airport. The Trial Chamber notes that of these targets, the only one that was hit was Zagreb/Plešo airport, where one bomblet landed in a parking lot. [...] However, as will be shown below, the presence or otherwise of military targets in Zagreb is irrelevant in light of the nature of the M-87 Orkan.
2. The M-87 Orkan is a non-guided projectile, the primary military use of which is to target soldiers and armoured vehicles. Each rocket may contain either a cluster warhead with 288 so-called bomblets or 24 anti-tank shells. The evidence shows that rockets with cluster warheads containing bomblets were launched in the attacks on Zagreb on 2 and 3 May 1995. Each bomblet contains 420 pellets of 3mm in diameter. The bomblets are ejected from the rocket at a height of 800-1,000m above the targeted area and explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometres. The dispersion error of the rocket at 800-1,000m in the air increases with the firing range. Fired from the maximum range, this error is about 1,000m in any direction. The area of dispersion of the bomblets on the ground is about two hectares. Each pellet has a lethal range of ten metres.
3. The evidence shows that the M-87 Orkan was fired on 2 and 3 May 1995 from the Vojnić area, near Slavsko Polje, between 47 and 51 kilometres from Zagreb. However, the Trial Chamber notes in this respect that the weapon was fired from the extreme of its range. Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. The Trial Chamber therefore concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties. By 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved. Furthermore, before the decision was made to once again use this weapon on Zagreb on 3 May 1995, the full impact of using such an indiscriminate weapon was known beyond doubt as a result of the extensive media coverage on 2 May 1995 of the effects of the attack on Zagreb.

(c) Defence argument on reprisals

1. The Defence submits that the shelling of Zagreb may be considered lawful reprisal, carried out with the aim of putting an end to violations of international humanitarian law committed by “the Croatian military and police forces”. In particular, the Defence submits that the shelling of Zagreb was a reaction to Operation Flash, which was in breach of the cease fire agreement, and “conducted without any respect to the norms of international humanitarian law”.
2. In the law of armed conflict, belligerent reprisals are acts resorted to by one belligerent which would otherwise be unlawful, but which are rendered lawful by the fact that they are taken in response to a violation of that law committed by the other belligerent. Reprisals are therefore drastic and exceptional measures employed by one belligerent for the sole purpose of seeking compliance with the law of armed conflict by the opposite party. It follows that reprisals, in order to be considered lawful, are subject to strict conditions. These conditions are well-established in customary law and are set forth below.
3. Reprisals may be used only as a last resort and only when all other means have proven to be ineffective. This limitation entails that reprisals may be exercised only after a prior and formal warning has been given, which has failed to put an end to the violations committed by the adversary. In addition, reprisals may only be taken after a decision to this effect has been made at the highest political or military level.
4. A further requirement is that the measures taken must be proportionate to the initial violation of the law of armed conflict of the opposite party. According to this condition, the reprisals must cease as soon as they have achieved their purpose of putting an end to the breach which provoked them. Finally, acts of reprisal must respect the “laws of humanity and dictates of public conscience”. The Trial Chamber interprets this condition to mean that reprisals must be exercised, to the extent possible, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians.
5. The Trial Chamber finds that the evidence presented to the Trial Chamber regarding the shelling of Zagreb fails to show that the conditions for lawful reprisals have been met. First, even if the Trial Chamber was to assume that the Croatian forces had engaged in serious violations of international humanitarian law during Operation Flash, the evidence shows that the shelling was not carried out as a last resort, after having exhausted all other means. Indeed, the Trial Chamber has been provided with evidence that peace negotiations were ongoing during Operation Flash, until 3 May 1995. Furthermore, no formal warning was given prior to the shelling that acts of reprisals would be carried out in reaction to the alleged violations conducted during Operation Flash. The Trial Chamber cannot therefore find that the shelling of Zagreb constituted a lawful reprisal and does not consider it necessary to analyse the issue of reprisal any further. [...]

(e) Counts 15 and 16 – Murder

1. The Trial Chamber finds that the deaths of Ana Mutevelić, Damir Dračić, Stjepan Krhen, Ivanka Kovač, Ivan Brodar, Luka Skračić and Ivan Markulin were caused as a result of the rocket attacks on Zagreb, which were ordered by Milan Martić. Having regard in particular to the Trial Chamber’s findings concerning the nature of the M-87 Orkan and that Milan Martić, who ordered the use of the M-87 Orkan,

was aware that death was a probable consequence of this attack, the Trial Chamber finds that the mental element of the crime of murder is established. The Trial Chamber recalls that Ivan Markulin was a member of the Croatian MUP and that he was in the process of deactivating a bomb at the time of his death and was not taking an active part in the hostilities. The Trial Chamber therefore finds that Milan Martić bears individual criminal responsibility under Article 7(1) of the Statute for Counts 15 and 16 for the murder of Ana Mutevelić, Damir Dračić, Stjepan Krhen, Ivanka Kovač, Ivan Brodar, and Luka Skračić. The Trial Chamber further finds that Milan Martić bears individual criminal responsibility under Article 7(1) of the Statute for Count 16 for the murder of Ivan Markulin.

(f) *Counts 17 and 18 – Inhumane acts under Article 5(i) and cruel treatment under Article 3*

1. The Trial Chamber finds that the evidence from persons injured during the shelling of Zagreb is representative of the injuries and suffering caused to the 214 persons who were injured on 2 and 3 May 1995. The Trial Chamber therefore concludes that the shelling caused serious mental and/or physical suffering to those injured. The Trial Chamber considers that Milan Martić knew that the shelling was likely to cause such suffering, and thus intentionally committed acts which amount to cruel treatment under Article 3 and inhumane acts under Article 5 against these persons. The Trial Chamber recalls that of the persons injured, 7 were not civilians. The Trial Chamber therefore finds Milan Martić incurs individual criminal responsibility under Article 7(1) of the Statute for Count 17, other inhumane acts under Article 5(i), and for Count 18 for cruel treatment under Article 3 in relation to 207 victims and for Count 18, cruel treatment under Article 3, in relation to the other 7 victims.

(g) *Count 19 – Attacks on civilians under Article 3*

1. In examining the responsibility of Milan Martić for the crime of attacks on civilians under Article 3, the Trial Chamber recalls that a direct attack on civilians may be inferred from the indiscriminate character of the weapon used. The Trial Chamber has previously found that the M-87 Orkan was incapable of hitting specific targets. The Trial Chamber has also found that these attacks resulted in death and serious injury to the civilian population. Having regard in particular to the nature of the M-87 Orkan and the finding that Milan Martić knew of the effects of this weapon, the Trial Chamber finds that Milan Martić wilfully made the civilian population of Zagreb the object of this attack. Milan Martić therefore incurs individual criminal responsibility under Article 7(1) of the Statute for Count 19, attacks on civilians under Article 3.

[...]

C. Appeals Chamber Judgement

[Source: 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-95-11-A, 8 October 2008; footnotes omitted]

PROSECUTOR

v.

MILAN MARTIC

Judgement

[N.B.: The Appeals Chamber rejected all grounds of appeal against the parts of the Trial Chamber Judgement reproduced above]

[...]

(a) *The M-87 Orkan rocket as an indiscriminate weapon incapable of hitting specific targets*

[...]

1. At the outset, the Appeals Chamber rejects Martić's arguments in relation to the Luna rocket system. Whether the RSK had another artillery system at its disposal is irrelevant as regards the inquiry into whether the Trial Chamber erred when it considered the M-87 Orkan to be an indiscriminate weapon. The weapon used in the shelling of Zagreb was the M-87 Orkan. Martić has not challenged this finding by the Trial Chamber.

[...]

(d) *The justification of the shelling of Zagreb as a reprisal or as a means of survival*

[...]

1. As for Martić's alternative argument that the shelling of Zagreb was a lawful military action conducted in self-defence, the Appeals Chamber recalls that "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out was criminal or not." The Appeals Chamber has previously rejected Martić's challenges to the Trial Chamber's findings that the M-87 Orkan was an indiscriminate weapon, that the shelling of Zagreb constituted a widespread attack against the civilian population, that Martić made the civilian population the object of attack, and that he ordered the shelling of Zagreb. As Martić has failed to show any error in the Trial Chamber's conclusion that he deliberately targeted the civilian population of Zagreb, his argument that the shelling of Zagreb was conducted in self-defence must fail. The Appeals Chamber takes note of Martić arguments in his concluding statement at the appeal hearing that "the Serbs were not aggressors but rather defended themselves in a situation when the United Nations made no attempt to protect them [...]." However, in particular in light of the fact that the prohibition against attacking civilians is absolute, the Appeals Chamber fails to see how this claim could justify Martić's actions in relation to the shelling of Zagreb.

[...]

(e) Precautions pursuant to Article 58 Additional Protocol I

1. The Trial Chamber did not address the question of whether or not Croatia had obligations to take precautions against the effects of attacks according to Article 58 of Additional Protocol I. Martić's argues that the Trial Chamber was required to find a violation of Article 58 of Additional Protocol I by Croatia because "if preventive measures were taken, there would have been no civilian casualties." The Appeals Chamber squarely rejects this argument. It is one of the pillars of international humanitarian law that its provisions have to be applied in all circumstances. One side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all of its obligations. Consequently, Martić's argument as to alleged violations of Article 58 of Additional Protocol I by Croatia are irrelevant when assessing his individual criminal responsibility for violating international humanitarian law, in this case the prohibition to make the civilian population the object of attack. [...]

Discussion

1. What is the purpose and what are the advantages and disadvantages of the Rule 61 Procedure? Compared with an in absentia trial? With a simple indictment by the Prosecutor?
2. (*Rule 61 Decision, paras 8, 11-14*) Was the armed conflict between the Republic of Croatia and the self-proclaimed Republic of Serbian Krajina an international armed conflict or a non-international armed conflict? Under which conditions could it be qualified as international? Does the ICTY qualify the conflict?
3.
 - a. (*Rule 61 Decision, para. 8*) Does every attack wilfully killing and wounding civilians violate Protocols I and II? If not, in which cases are the Protocols violated? Are the conditions different under Protocol I and Protocol II? Does every attack directed at civilians violate Protocols I and II? (P I, Art. 51; P II, Art. 13)
 - b. Can the prohibition on wilfully killing or wounding civilians already be deduced from the Martens clause? What are the advantages and disadvantages of basing such a prohibition on the Martens clause?
 - c. Are indiscriminate attacks prohibited by Protocol I? By Protocol II? By customary IHL applicable to non-international armed conflicts? Is there a difference between attacks directed against civilians and indiscriminate attacks? Under Protocol I? According to the ICTY? (P I, Art. 51; CIHL, Rules 11 and 12)
 - d. Are M-87 Orkan weapons inherently indiscriminate weapons? Were they indiscriminate in this case? Why? Because they contained cluster warheads? Because the rocket itself could not be aimed accurately enough at a military objective? (P I, Art. 51(4); CIHL Rule 12)
 - e. Which specific prohibition of Protocol I was violated by the M-87 Orkan rocket? Is this prohibition also applicable in non-international armed conflicts? Why? (P I, Art. 51(4)(b); CIHL Rule 12)
 - f. Is common Article 3 applicable to the conduct of hostilities? Under common Article 3, is every deliberate killing of a civilian by a rocket attack murder and does every wounding of a civilian constitute cruel treatment? Even when the attack is directed at a military objective?
4. Does the availability of an alternative weapon ever matter when deciding whether an attack is indiscriminate? Whether a weapon is indiscriminate? Whether it cannot be directed at a specific military

objective? When deciding whether all feasible precautionary measures were taken? (P I, Arts 51 and 57)

5.
 - a. Is every attack affecting the civilian population prohibited by Protocol I also unlawful if committed as a proportionate reprisal aimed at stopping similar unlawful attacks by the enemy? Under Protocol I ? Under customary IHL? According to the Rule 61 decision? According to the Trial Chamber Judgement? (P I, Art. 51(6); CIHL, Rule 145)
 - b. Does Protocol II prohibit reprisals consisting of proportionate violations of Protocol II aimed at stopping similar violations by the adverse party? Is the very concept of reprisals legally conceivable in non-international armed conflicts? (P II, Art. 13) Does customary IHL prohibit reprisals in non-international armed conflicts? (CIHL, Rule 148)
 - c. Does Article 60(5) of the Vienna Convention on the Law of Treaties imply that any reprisals consisting of violations of IHL treaties are unlawful? Is there a difference between reprisals and the ending or suspension of the operation of a treaty because of a substantial breach?
 - d. According to the Trial Chamber Judgement, what are the conditions for a lawful reprisal?
 - e. (*Trial Chamber Judgement, para. 467*) What does the condition that acts of reprisal must respect the “laws of humanity and dictates of public conscience” mean? Does not every reprisal, by definition, violate an IHL prohibition? Does the said condition mean that reprisals may never be directed against the civilian population? That a reprisal may never consist of an indiscriminate attack? When is it impossible to carry out a reprisal in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition on the targeting of civilians?
 - f. Does the condition that reprisals may only be used as a last resort mean that they may never be used during peace negotiations? Never during negotiations to end violations of IHL?
 - g. May a violation of IHL ever be justified by an extreme situation of self-defence, where the very survival of a State is at stake? According to the ICTY Appeals Chamber? According to the ICJ ?
[See ICJ, Nuclear Weapons Advisory Opinion [Para. 105 E]]
6. Is the protection of the civilian population a responsibility shared both by the attacker and by the defender? Have they an equal responsibility in this regard? Does the defender’s failure to take passive precautions absolve the attacker from responsibility for an indiscriminate attack? In the case under discussion here? In any situation? Does the defender’s failure to respect the prohibition on the use of human shields absolve the attacker from responsibility for an indiscriminate attack? (P I, Arts 51(7) and 58)