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APPEALS JUDGEMENT SUMMARY

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APPEALS CHAMBER

The Hague, 8 October 2008

Summary of the Appeal Judgement Prosecutor v. Milan Martić

Please find below the summary of the appeals judgement today read out by Judge Pocar:

Introductory Remarks

As the Registrar announced, the case on our agenda today is *Prosecutor versus Milan Martić*. In accordance with the Order scheduling the hearing issued on 29 September 2008, the Appeals Chamber will deliver its Judgement today.

Following the practice of the International Tribunal, I will not read out the text of the judgement except for the disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. This summary is not part of the written judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written judgement will be made available to the parties at the conclusion of this hearing.

Background

The events giving rise to this appeal took place between August 1991 and December 1995 in the Serbian Autonomous Region of Krajina (also known as "SAO Krajina") and the Republic of Serbian Krajina (also known as "RSK"). During the relevant period, Milan Martić held various positions within the government of the SAO Krajina, which later evolved into the RSK. These positions included Chief of the Police in Knin, Secretary for Internal Affairs of the SAO Krajina, Deputy Commander of the Territorial Defence of the SAO Krajina, Minister of Defence of the SAO Krajina, Minister of the Interior of the SAO Krajina and of the RSK and, from 25 January 1994 onwards, President of the RSK.

The Trial Chamber found that Milan Martić participated in a joint criminal enterprise, the common purpose of which was the establishment of an ethnically Serb territory through the displacement of the non-Serb population. Martić was convicted of the following crimes:

- persecution as a crime against humanity;
- murder as a crime against humanity;
- murder as a violation of the laws or customs of war;
- imprisonment as a crime against humanity;
- torture as a crime against humanity;
- inhumane acts as a crime against humanity;
- torture as a violation of the laws or customs of war;
- cruel treatment as a violation of the laws or customs of war;
- deportation as a crime against humanity;
- forcible transfer as a crime against humanity;
- wanton destruction of villages or devastation not justified by military necessity as a violation of the laws or customs of war;

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Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands

Tel.: +31-70-512-5343; 512-5356 Fax: +31-70-512-5355

- destruction or wilful damage done to institutions dedicated to education or religion as a violation of the laws or customs of war; and
- plunder of public or private property as a violation of the laws or customs of war.

The Trial Chamber specifically convicted Martić for deportation, forcible transfer and persecution (in part) as crimes falling within the JCE, and for the other counts as natural and foreseeable consequences of the common purpose to create a Serb dominated territory.

The Trial Chamber further found that Martić ordered the shelling of Zagreb on 2 and 3 May 1995. It therefore held that he was individually criminally responsible pursuant to Article 7(1) of the Statute for ordering:

- 1 murder as a crime against humanity;
- 2 murder as a violation of the laws or customs of war;
- 3 inhumane acts as a crime against humanity;
- 4 cruel treatment as a violation of the laws or customs of war; and
- 5 attacks on civilians as a violation of the laws or customs of war.

The Trial Chamber sentenced Martić to a single sentence of thirty five years of imprisonment.

The Appeals

Milan Martić brought ten grounds of appeal against the Trial Judgement:

first, an alleged error of law by not providing a reasoned judgement;

second, alleged violations of his right to be tried by an impartial tribunal and to be presumed innocent;

third, an alleged error of law regarding the evaluation of evidence;

fourth, alleged errors of law regarding joint criminal enterprise;

fifth, alleged errors of fact in findings concerning the joint criminal enterprise;

sixth, an alleged error of law regarding the mode of commission of ordering;

seventh, alleged errors of fact concerning the shelling of Zagreb;

eighth, alleged errors of fact in making erroneous and insufficient findings;

ninth, alleged errors of law regarding sentencing;

and finally, alleged errors of fact concerning sentencing. Milan Martić sought an acquittal on all charges. Alternatively, he requested that he be given a new trial or that his sentence be significantly reduced.

The Office of the Prosecutor identified one ground of appeal against the Trial Judgement. It argued that the Trial Chamber erred in law in finding that Article 5 of the Statute does not encompass crimes committed against persons *hors de combat*. It requested that the Appeals Chamber correct the legal error, revise the Trial Chamber's factual findings relating to Counts charged under Article 5 of the Statute, and adjust Martić's sentence accordingly.

Findings by the Appeals Chamber

I will now briefly summarize the conclusions of the Appeal Chamber.

In his first ground of appeal, Milan Martić alleges that the Trial Chamber violated his right under Article 23(2) of the Statute to be provided with a reasoned opinion with regards to all the Trial Chamber's findings of guilt. The Appeals Chamber dismisses this ground of appeal due to its vagueness.

Under his second ground of appeal, Martić claims that the Trial Chamber violated his right to be tried by an impartial tribunal and to be presumed innocent. Concerning Martić's allegation that the Trial Chamber violated his right to be presumed innocent and to remain silent in its consideration of the evidence regarding his personality and voluntary surrender, the Appeals Chamber notes that challenged sections of the Trial Judgement only deal with his sentence and fall within the discretion of the Trial Chamber. Other claims by Martić go to the substance of the Trial Chamber's findings rather than to the presumption of innocence; the Appeals Chamber has therefore dealt with them in other portions of the Judgement.

Concerning his allegedly violated right to be tried before an impartial tribunal, the Appeals Chamber finds that the conduct by judges at trial did not give rise to an appearance of bias. The Appeals Chamber therefore dismisses Martić's second ground of appeal in its entirety.

Under his third ground of appeal, Milan Martić claims that the Trial Chamber erred in law by *inter alia* applying to the Prosecution's evidence a standard of proof lower than the one required in international criminal law.

The Appeals Chamber finds that the Trial Chamber's reference to a "high degree of probability" in one of the footnotes to the section on standard of proof is confusing and not in accordance with the standard of proof of a criminal trial. However, the Appeals Chamber is satisfied that, with respect to the application of the standard, the Trial Chamber adopted the proper standard of proof beyond reasonable doubt in its consideration of the evidence. The Appeals Chamber therefore dismisses Martić's third ground of appeal in its entirety.

In his fourth ground of appeal, Martić alleges that the Trial Chamber erred in law by failing to properly elaborate on the elements of the law of joint criminal enterprise. The Appeals Chamber finds that the Trial Chamber correctly stated the law applicable to joint criminal enterprise and duly described the requirements for a conviction pursuant to that mode of liability.

The Appeals Chamber therefore dismisses Martić's fourth ground of appeal in its entirety.

In his fifth ground of appeal, Martić alleges errors of fact in the Trial Chamber's findings relating to the general requirements of Articles 3 and 5 of the Statute, the existence of the joint criminal enterprise, his participation in the joint criminal enterprise and the crimes committed in furtherance of the common criminal purpose of the joint criminal enterprise. In addition, Martić also argues under various grounds of appeal that the Trial Chamber erred in failing to properly establish a link between himself and the principal perpetrators of the crimes.

In challenging the Trial Chamber's findings that the general requirements of Articles 3 and 5 of the Statute had been established, Martić argues that the Trial Chamber erred in finding that a state of armed conflict existed in the relevant territories of Croatia and the Republic of Bosnia and Herzegovina during the Indictment period and that the crimes charged were committed in the context of that armed conflict. Further, Martić challenges the finding that there was a widespread and systematic attack against the Croat and non-Serb civilian population in those territories during the same period. The Appeals Chamber finds that Martić merely suggests a different interpretation of the facts to that of the Trial Chamber and failed to show that the Trial Chamber erred in its findings. Accordingly the Appeals Chamber dismisses this sub-ground of appeal.

With regard to Martić's challenges to the Trial Chamber's findings on the clashes in and around the village of Kijevo on 26 August 1991 and the Kijevo ultimatum, the Appeals

Chamber finds that Martić has not shown that no reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It therefore dismisses these sub-grounds.

Martić argues that the Trial Chamber erred in not making findings on the background and political objectives of the Serb leadership. He argues that, had the Trial Chamber taken into account the preceding historical context, it would have understood that Martić advocated for an independent Serb state or at least a substantial degree of autonomy within Croatia as a response to the aims of the Croatian authorities. To the extent that Martić's argument is an attempt to plead that the acts for which he was found responsible should not be considered criminal because they were a response to crimes committed against him and his people, this must be rejected. The Appeals Chamber reiterates that this is not an available defence to serious violations of international humanitarian law.

To the extent that Martić argues that the Trial Chamber erred in failing to take into account relevant contextual factors, in particular the political objectives of the Serb leadership, the Appeals Chamber is not persuaded that the Trial Chamber erred in either respect. The Trial Chamber considered that the political aims of the Serb leadership "to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory" did not "amount to a common purpose within the meaning of the law on joint criminal enterprise pursuant to Article 7(1) of the Statute". The Trial Chamber rather held that "where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose." The Trial Chamber, in other words, found that the objectives of the Serb leadership were "implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation", which "necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory." Martić was not convicted for his political views or for the political aims of the Serb leadership. Rather, the Trial Chamber found that, in pursuing political aims, Martić and other political and military leaders committed serious crimes.

With regard to Martić's submissions that no reasonable trier of fact could have concluded that he had deliberately refrained from intervening against perpetrators who committed crimes against the non-Serb population, the Appeals Chamber notes that the Trial Chamber did not convict Martić for his failure to intervene against the perpetrators of crimes against non-Serbs. The Trial Chamber observed that "the evidence includes only scarce reference to Milan Martić acting to take measures to prevent or punish such crimes" - language very close to that of Article 7(3) of the Statute. However, the Appeals Chamber takes into consideration that these statements were made in order to establish that Martić had the requisite *mens rea* to be held criminally responsible as a participant in the JCE. The Appeals Chamber is of the view that it was not for Martić to bring evidence that he took action to punish the crimes committed against non-Serbs, rather it was for the Prosecution to prove that he failed to do so. In this respect, the Trial Chamber erred; however, the Appeals Chamber does not find that this error affected the reasonableness of the Trial Chamber's overall conclusion regarding Martić's *mens rea*. Accordingly, this sub-ground of appeal is dismissed.

The Appeals Chamber further summarily dismisses Martić's challenges to the Trial Chamber's findings regarding crimes committed during several armed clashes between Serb and Croatian forces in the SAO Krajina on the basis that they challenge factual findings on which a conviction does not rely, they misrepresent or ignore the Trial Chamber's findings, they include assertions that the Trial Chamber should have interpreted evidence in a particular manner, include assertions unsupported by any evidence and include assertions that the Trial Chamber should or should not have relied on certain pieces of evidence.

In relation to his conviction for crimes committed in Benkovac, Martić submits that the Trial Chamber erred in making these findings because the evidence upon which the Trial Chamber relied was unsupported and uncorroborated. The Appeals Chamber notes that the Prosecution acknowledged that these convictions should be reversed for reasons of fairness

as they did not form part of the case against Martić. The Appeals Chamber therefore finds that the Trial Chamber erred in convicting Martić for crimes committed in Benkovac and reverses Martić's conviction for Counts 8 and 9 in respect of the crimes perpetrated against Ivan Atelj and Šime Čačić in Benkovac and Counts 7 and 9 in respect of the crimes perpetrated against the three children detained in a kindergarten in Benkovac.

In various sections of his appeal brief, Martić challenges the findings of the Trial Chamber establishing a link between the principal perpetrators of the criminal acts charged in the Indictment and himself. More specifically, Martić alleges that the Trial Chamber erred on various occasions in reaching the conclusion that crimes were committed by forces under his control or the control of another member of the joint criminal enterprise. The Appeals Chamber recalls that in *Brđanin*, the Appeals Chamber held that members of a joint criminal enterprise can be held liable for crimes committed by principal perpetrators who were not members of the joint criminal enterprise provided that it has been shown that the crimes can be imputed to at least one member of the joint criminal enterprise and that this member, when using a principal perpetrator, acted in accordance with the common plan. The establishment of a link between the crimes in question and a member of the joint criminal enterprise is a matter to be assessed on a case by case basis.

The Appeals Chamber has considered the Trial Chamber's findings on the crimes for which Martić was convicted as a participant in a joint criminal enterprise, to determine whether there was a sufficient link between the principal perpetrators of the crimes and Martić or another member of the joint criminal enterprise.

The Trial Chamber considered that the JNA, the police and other Serb forces active on the territory of the SAO Krajina and the RSK were structured hierarchically and closely coordinated with each other. Moreover, the Trial Chamber reached findings on the plurality of members of the joint criminal enterprise and on Martić's contribution to the joint criminal enterprise. Finally, the Trial Chamber explicitly found that the objective of uniting Serb areas was implemented "through widespread and systematic armed attacks"... "and through the commission of acts of violence and intimidation". While it would have been preferable for the Trial Chamber to make an explicit finding that members of the joint criminal enterprise, when using these forces, were acting in accordance with the common plan, the Appeals Chamber finds that this omission does not invalidate the Trial Judgement. Such attacks could not have been implemented but with the participation of forces under the JCE members' control.

Therefore, with respect of the crimes committed by the *Milicija Krajine*, the JNA, the TO, the MUP or a combination thereof in Hrvatska Dubica, Cerovljani, Baćin, Burška, the JNA 9th corps barracks in Knin, the old hospital in Knin and the Titova Korenica facility, the Appeals Chamber finds the Trial Chamber did not err in establishing the required link between Martić and the perpetrators. Similarly, the Appeals Chamber finds no error in the Trial Chamber's finding that a sufficient link existed between the principal perpetrators and Martić with regard to the crimes committed in Lipovača by Serb paramilitary forces, crimes committed in Škabrnja and Nadin, and Saborsko by a combination of JNA soldiers or TO soldiers or other units, and crimes of persecution and deportation committed by the JNA, the TO, the *Milicija Krajine*, the MUP, the armed forces or police officers of the SAO Krajina and the RSK. The Appeals Chamber dismisses this sub-ground of appeal in relation to these crimes.

However, the Appeals Chamber finds that the Trial Chamber erred in finding that the required link existed between Martić and the principal perpetrators with regard to crimes committed in Cerovljani by armed Serbs from Živaja led by Nikola Begović, crimes committed in Vukovići and Poljanak by unidentified Serbs or soldiers and crimes committed in Vukovići by a combination of JNA soldiers or TO soldiers and other units. With regard to these crimes, the Appeals Chamber finds that a miscarriage of justice resulted and reverses Martić's convictions under Counts 1, 3, 4, 12 and 13 insofar as they relate to these crimes.

I add that Judge Schomburg appends a separate opinion on the matter of joint criminal enterprise.

In his sixth ground of appeal, Martić submits that the Trial Chamber erred in setting out the mental element of ordering a crime under Article 7(1) of the Statute in holding that indirect intent was sufficient for ordering. The Appeals Chamber finds no error in the approach taken by the Trial Chamber and dismisses Martić's sixth ground of appeal.

In his seventh ground of appeal, Martić claims that the Trial Chamber erred when it found that he ordered the shelling of Zagreb on 2 and 3 May 1995. The Appeals Chamber finds that Martić has not shown that the Trial Chamber erred when it found that Martić himself admitted to ordering the shelling of Zagreb and that circumstantial evidence also supported a finding that he did in fact issue an order. Consequently, the Trial Chamber's conclusion "in light of the totality of the evidence" that it was proven beyond reasonable doubt that Martić ordered the shelling stands. The Appeals Chamber dismisses Martić's seventh ground of appeal.

In his eighth ground of appeal, Martić argues that the shelling of Zagreb constituted a lawful reprisal. He contends that the Trial Chamber failed to consider the unlawful purpose and effects of Operation Flash, launched by Croat forces, in breach of a cease fire agreement. He argues that in doing so, the Trial Chamber disregarded relevant evidence. In the alternative, he argues that the shelling of Zagreb was a lawful military action undertaken in self-defence.

After reviewing the evidence, the Appeals Chamber finds that Martić has not demonstrated that the Trial Chamber erred when it found that the M-87 Orkan - as used in the circumstances of the case - was an indiscriminate weapon, incapable of hitting specific targets. Furthermore, the Appeals Chamber is satisfied that a reasonable Trial Chamber could have concluded beyond reasonable doubt that Martić knew of the effects of the M-87 Orkan when he ordered the shelling of Zagreb. This sub-ground of appeal is accordingly dismissed.

As for Martić's alternative argument that the shelling of Zagreb was a lawful military action conducted in self-defence, since Martić has failed to show any error in the Trial Chamber's conclusion that he deliberately targeted the civilian population of Zagreb, this submission must fail. In light of the fact that the prohibition against attacking civilians is absolute, the Appeals Chamber fails to see how Martić's argument that the Serbs were not aggressors but rather were defending themselves could justify Martić's actions in relation to the shelling of Zagreb.

For these reasons, and on the basis of the full reasoning in the Judgement, the Appeals Chamber dismisses Martić's eighth ground of appeal.

In its sole ground of appeal, the Prosecution submits that the Trial Chamber erred in finding that people *hors de combat* could not be victims of crimes against humanity. In support of this, the Prosecution argues that the definition of "civilians" when used in the context of crimes against humanity should not be limited to its definition under international humanitarian law but could also include other categories of people. While the Appeals Chamber considers that certain terms have been defined differently in international humanitarian law and international criminal law, the fundamental character of the notion of civilian in international humanitarian law and international criminal law weighs against giving them different definitions under Article 3 and Article 5 of the Statute. The Appeals Chamber therefore finds that the definition of civilian contained in Article 50 of Additional Protocol I reflects the definition of civilian for the purposes of Article 5 of the Statute and does not include people *hors de combat*.

That said, the Appeals Chamber notes that the relevance of the "civilian population" in Article 5 of the Statute is to the *chapeau* requirement that there be a widespread or systematic attack against a civilian population. There is nothing in the text of Article 5 of

the Statute or previous authorities of the Appeals Chamber that requires individual victims of crimes against humanity to be civilians. A person *hors de combat* may thus be the victim of an act amounting to a crime against humanity provided that all the other necessary conditions are met, including that the crimes occur as part of a widespread or systematic attack against the civilian population.

The Appeals Chamber finds that the Trial Chamber erred in law in this respect and had it not done so, it would have entered convictions under Article 5 for murder (Count 3), torture (Count 6), inhumane acts (Count 7) and persecution (Count 1) for acts committed against victims who were *hors de combat* at the time of the commission of the offence. The Appeals Chamber finds that all elements of these offences have been met in relation to these victims and enters convictions for these crimes, with the exception of the conviction for crimes committed in Benkovac, which the Appeals Chamber reversed.

Turning to sentencing, in his ninth ground of appeal, Martić contends that the Trial Chamber erred when it held that Article 24 of the Statute and Rule 101 of the Rules, which contain general factors that the Trial Chamber is to take into account when determining sentences, do not impose binding obligations. He further challenges the comparison of his case to that of *Babić* in the determination of his sentence. The Appeals Chamber rejects these alleged errors.

In his tenth ground of appeal, Martić alleges that the Trial Chamber erred in fact and in law in determining the gravity of the offence as well as the aggravating and mitigating factors. These errors, he claims, invalidate the Trial Judgement and occasioned a miscarriage of justice. The Appeals Chamber disagrees with Martić's claim that the Trial Chamber examined the gravity of offences that he did not commit. Since he does not put forward any argument to substantiate his claim, this sub-ground of appeal is dismissed. The Appeals Chamber also dismisses the challenges by Martić as to how the Trial Chamber interpreted and applied the aggravating and mitigating factors in the circumstances of this case.

Impact on sentence

Concerning the impact of the Appeals Chamber's findings on sentencing, the Appeals Chamber notes that it has allowed a number of Martić's sub-grounds of appeal under his fifth ground of appeal, as well as the Prosecutor's sole ground of appeal. In light of this, the Appeals Chamber has given consideration to whether an adjustment in Martić's sentence is appropriate.

The new convictions entered under Article 5 of the Statute serve to capture the full culpability of the accused. However, the Appeals Chamber finds that these convictions relate to underlying conduct already taken into account by the Trial Chamber when entering convictions under Article 3. Given that the material acts underlying the convictions are the same, they do not warrant an increase of sentence.

In relation to the convictions reversed on appeal, the Appeals Chamber considers that these reversals have minimal impact on Martić's overall culpability in light of the remaining crimes for which he was convicted and the impact they had on the victims.

In view of the foregoing, the Appeals Chamber affirms the sentence imposed by the Trial Chamber.

I will now read out the disposition of the appeal judgement. Milan Martić, will you please rise.

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the Appeal Hearing on 25 and 26 June 2008;

SITTING in open session;

ALLOWS Milan Martić's fifth ground of appeal, in relation to the crimes committed in Benkovac (Counts 7, 8 and 9, in part), Cerovljani (Counts 1, 12 and 13, in part), Vukovići (Counts 1, 3, 4 and 12, in part) and Poljanak (Counts 1, 3, 4 and 12, in part), as well as in relation to Count 10, in part;

DISMISSES all other grounds of appeal submitted by Milan Martić;

ALLOWS the Prosecution's alternative ground of appeal;

AFFIRMS Milan Martić's sentence of 35 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that Milan Martić is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

Judge Wolfgang Schomburg appends a separate opinion.
