

Court/Tribunal: International Criminal Tribunal for the former Yugoslavia

Case: *Prosecutor v. Dragomir Milosevic*

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Written by: Joseph Sellers

Procedural Posture

Pursuant to the Scheduling Order of October 15, 2009 and Rule 117(D) of the Rules of Procedure and Evidence of the Tribunal, the Appeals Chamber delivered its judgment in the case of the Prosecutor v. Dragomir Milosevic. The events giving rise to the appeals took place in the city of Sarajevo, Bosnia and Herzegovina, between August 1994 and November 1995. During that period, Dragomir Milosevic held the position of Commander of the Sarajevo Romanija Corps (“RSK”). The Trial Chamber found that the SRK soldiers under the command of Milosevic were responsible for continuously sniping and shelling the area of Sarajevo, which resulted in the death and serious injury of many civilians. The Trial Chamber thus found Milosevic guilty pursuant to Article 7(1) of the Statute of the 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 (the “Statute”) on various counts. These counts included: planning and ordering the crimes of terror, as a violation of the laws or customs of war (count 1); and murder and inhumane acts as crimes against humanity, committed through sniping (counts 2 and 3) and shelling (counts 5 and 6). As a result of the guilty verdict on count 1, the Trial Chamber dismissed the charges of unlawful attacks against civilians (counts 4 and 7) as impermissibly cumulative on the grounds that the elements of the crime of unlawful attacks against civilians are fully encompassed by the crime of terror in count 1. The Trial Chamber imposed a sentence of 33 years imprisonment.

Both parties appealed the Trial Judgment. Milosevic appealed on 12 grounds, and the Prosecutor appealed on a single ground. On the basis of his appeals, Milosevic requested that the Appeals Chamber acquit him of all charges. The Prosecutor appealed against the sentence and requested that the Appeals Chamber increase the sentence to life imprisonment.

The Appeals

As his first basis of appeal, Milosevic argued that the elements of the crime of terror had not been met. While the Appeals Chamber did hold that the Trial Chamber misinterpreted the *actus reus* requirement by stating that “actual infliction of death or serious harm to body or health is a required element of the crime of terror,” the Appeals Chamber held that the Trial Chamber’s legal error was “without impact” on its review of the evidence and subsequent finding of guilt. The Appeals Chamber explained that the crime of terror only requires that “the victims suffered grave consequences resulting from the acts or threats of violence” and that “such grave consequences include, but are not limited to death or serious injury to body or health.” Therefore, the Trial Chamber’s finding that “all the incidents imputed to the SRK constituted unlawful attacks against civilians and thus caused death or serious injury to body or health of civilians,” fulfilled the elements of the crime of terror. The Appeals Chamber went on to clarify the applicable law on cumulative convictions relating to the crime of terror and unlawful attacks on civilians, explaining that cumulative convictions are allowed because “each

of the offences in question has an element requiring proof of fact not required by the other.”

The Appeals Chamber rejected Milosevic’s argument that the Trial Chamber could not take into account evidence of actual terror experienced by the civilian population in Sarajevo, holding that the actual infliction of terror was a reasonable factor to consider in determining Milosevic’s *mens rea*.

As part of this first argument for appeal, Milosevic argued that the Trial Chamber failed to establish beyond a reasonable doubt that the SRK attacks targeted civilians because it failed to consider areas of Sarajevo held by the Army of Bosnia and Herzegovina (“ABiH”). The Appeals Chamber rejected this argument because there is no requirement that areas be designated military or civilian, and the distinction must be made on a case-by-case basis as to who is targeted in each attack. The Appeals Chamber rejected Milosevic’s first ground for appeal.

As his second basis for appeal, Milosevic argued that the Trial Chamber erred by considering evidence that it had not admitted during trial. The Appeals Chamber dismissed this ground for appeal.

Milosevic’s third contention on appeal was that the Trial Chamber failed to consider the evidence as a whole, especially evidence concerning the military activity of the ABiH. The Appeals Chamber rejected this argument because it found that Milosevic had failed to meet the standard of review on appeal.

Milosevic’s fourth assertion on appeal challenged the Trial Chamber’s findings regarding the civilian status of trams in Sarajevo, which were targets of SRK sniping on numerous days. Aside from one sniping incident in which one soldier was alleged to be present, the Trial Chamber had been satisfied that there were no military personnel present or in the immediate surroundings during these incidents. The Appeals Chamber dismissed Milosevic’s claim, finding his argument that the tram was a military target due to the presence of a single armed soldier untenable.

As his sixth ground for appeal, Milosevic challenged the Trial Chamber’s finding of fact concerning the civilian status of various areas within Sarajevo. The Appeals Chamber held that the Trial Chamber correctly engaged “in a case-by-case analysis of the targets and modalities of attack, and not that of status of ‘zones’” and was satisfied that the Trial Chamber had correctly established that the populations of the areas in question had civilian status at the time of the attacks.

As his seventh argument on appeal, Milosevic challenged the Trial Chamber’s finding of fact that SRK members were behind specific instances of sniper fire. The Appeals Chamber rejected this ground for appeal because Milosevic “failed to demonstrate any discernible error” in the Trial Court’s analysis of the evidence or reasoning.

Similarly, Milosevic challenged the Trial Chamber’s findings of fact regarding SRK responsibility for certain shelling incidents of Livanjska street on 8 November, 1994, and the Bascarsija flea market on 22 December, 1994. As to the first shelling incident, the Appeals

Chamber held that Milosevic failed to show that the Trial Chamber's conclusions were erroneous. As to the second incident, the Appeals Chamber noted the lack of clear evidence regarding the origin of the shelling. Both shells that exploded in the flea market had come from the south-east, the direction in which both the SRK and ABiH were positioned. The Appeals Chamber stated that the Trial Chamber could have determined the source of the shells with more precision, and held that the Trial Chamber "failed to address the deficiencies in the relevant evidence and to articulate its reason for dismissing other possible conclusions with respect to the origin of fire." Therefore, the Appeals Chamber overturned Milosevic's conviction for the shelling incident of December 22, 1994.

For his ninth, tenth, and eleventh bases of appeal, Milosevic challenged the Trial Chamber's findings of fact regarding the possession and use of "modified air bombs." In relation to shelling incidents on 28 June 1995, 7 April 1995, and 23 August 1995, Milosevic challenged the Trial Chamber's findings of SRK responsibility based on a "general claim that ABiH possessed modified air bombs." The Appeals Chamber rejected all three grounds for appeal because, in the case of the 28 June shelling, Milosevic failed "to show that no reasonable trier of fact could have found...that the TV building was hit by a modified air bombs launched from SRK-held territory," and, in the case of the 7 April and 23 August shellings, Milosevic failed to demonstrate that the Trial Chamber's findings were erroneous.

As his twelfth basis for appeal, Milosevic challenged the Trial Chamber's finding that he ordered and planned the shelling and sniping attacks against civilians. The Appeals Chamber noted that the Trial Chamber "relied on the nature of the [sniping campaign] carried out in the context of a tight command" in its conclusion that the campaign could only have been carried out on Milosevic's orders. Due to this reliance, the Appeals Chamber was not satisfied that the Trial Court established the existence of a positive act of ordering, which is required for the *actus reus*. With respect to the *actus reus* of planning, the Appeals Chamber held that it could not be established beyond a reasonable doubt that Milosevic was responsible for planning the campaign of sniping of civilians. The Appeals Chamber found that it was unclear what evidence the Trial Chamber relied on when it found that Milosevic was able to implement the greater strategy for Sarajevo that was devised by his superiors. Moreover, the Appeals Chamber held that the Trial Chamber "abused its discretion," considering instances where Milosevic acted to prevent sniping as proof that he had planned and ordered the sniping campaign. Finally, the Appeals Chamber held evidence that "Milosevic generally controlled the sniping activity and training" does not make the Trial Chamber's conclusion that Milosevic ordered all sniping incidents a reasonable one. However, the Appeals Chamber noted that its findings about Milosevic's personal responsibility for the sniping incidents does not exclude holding Milosevic responsible for the crimes committed through sniping under Article 7(3) of the Statute "for having failed to prevent and punish the said crimes committed by his subordinates." The Appeals Court held that, although the Trial Court did not convict Milosevic under Article 7(3), the Trial Chamber did make sufficient findings to establish his "command responsibility for the sniping incidents" beyond a reasonable doubt.

As to Milosevic's personal responsibility for the shelling campaign, the Appeals Chamber held that it was not unreasonable for the Trial Chamber to conclude beyond reasonable doubt that all of the shelling using modified air bombs and mortars by the SRK during the indictment period

could only have been done pursuant to Milosevic's orders. The Trial Chamber relied on the "established fact that Milosevic was directly involved in the use and deployment of modified air bombs and issued orders regarding their use from as early as August 1994." However, in relation to Milosevic's fourth ground of appeal, that he cannot be held responsible for shelling incidents targeting the BITAS building on 22 August 1995 and the Markale Market on 28 August 1995 because he was receiving medical treatment in Belgrade, the Appeals Chamber held that the Trial Chamber "did not establish the existence of the prior positive act required for the *actus reus* of ordering." The Trial Chamber had simply made an inference based on the totality of the evidence that Milosevic had issued an order prior to his hospitalization. The Appeals Chamber thus reversed the convictions for the two shelling incidents at issue. The Appeals Chamber explained that these rulings pertain only to Milosevic's individual criminal culpability, and do not affect the conclusions that a campaign of shelling and sniping of the civilian population in Sarajevo took place during the relevant period.

As to Milosevic's fifth basis for appeal challenging his sentence, the Appeals Chamber held that the Trial Chamber correctly took into account Milosevic's planning and ordering gross and systematic violations of humanitarian law. Milosevic's orders to others were viewed as an aggravating circumstance, being seen as evidence of Milosevic's abuse of position. Therefore, the Appeals Chamber rejected Milosevic's fifth ground for appeal. However, the Appeals Chamber held that the Trial Chamber impermissibly counted certain aggravating factors twice in its sentencing considerations. However, even considering the aggravating factors only once would lead to a sentence comparable to that which the Trial Chamber imposed.

The Prosecutor's sole ground for appeal was a challenge to the sentence imposed by the Trial Chamber. The Prosecutor argued for a life sentence. While the Prosecutor argued that the sentence in Milosevic's case was inadequate when compared to the sentence of Stanislav Galic, the Appeals Chamber discounted the value of such comparisons because "the differences between cases are often more significant than similarities." In the end, the Appeals Chamber found that the Prosecutor did not identify any discernible error in the Trial Chamber's exercise of its sentencing discretion, and rejected the Prosecutor's appeal. However, due the Appeals Chamber's decisions to overturn certain aspects of the Trial Chamber's decision, the Appeals Court reduced Milosevic's sentence from 33 years to 29.