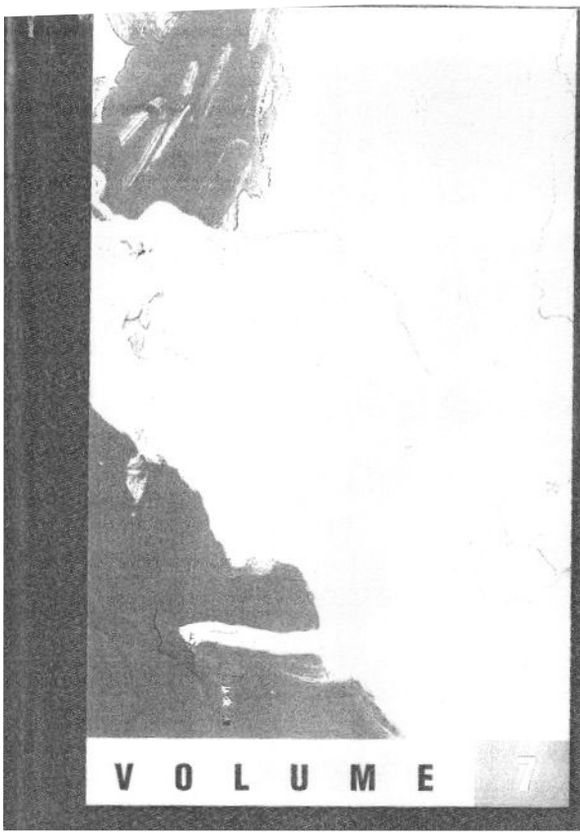

VOLUME 7

Annotated Leading Cases of International Criminal Tribunals

The International Criminal Tribunal for the former Yugoslavia 2001

André Klip and Göran Sluiter (eds.)

intersentia

ANNOTATED LEADING CASES OF

INTERNATIONAL CRIMINAL TRIBUNALS

VOLUME VII:

THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA 2001

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Commentary

I. Introduction

The Kordić and Čerkez Judgement – one of a series of cases of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to address serious violations committed in the Lašva Valley of Central Bosnia between 1991 and 1994 – is the first to have implicated a top level politician. Because the Judgement closely follows earlier ICTY jurisprudence on the scope and application of a wide range of crimes set out in the Statute of the International Criminal Tribunal for the Former Yugoslavia (Statute),[1] principles governing individual criminal responsibility and the scope of self-defence, it presents a convenient snapshot of ICTY doctrine on these issues.

The Indictment was originally confirmed on 10 November 1995. Almost two years later, on 6 October 1997, Kordić and Čerkez each voluntarily surrendered themselves to the ICTY. In the first Indictment, there were four other co-accused, but on 19 December 1997, charges were dropped against Ivan Santić and Pero Skopljak. The trials of Tihomir Blaškić and Zlatko Aleksovski were then separated from the Kordić and Čerkez proceedings. The Kordić and Čerkez Trial commenced on 12 April 1999 in Trial Chamber III with Judge Richard May of the United Kingdom presiding, flanked by Judge Mohamed Bennouna of Morocco and Judge Patrick Robinson of Jamaica. Kordić and Čerkez moved for an acquittal on 17 March 2000, but the Trial Chamber denied this motion on 6 April 2000. Closing arguments were made on 14-15 December 2000. The trial consumed 240 trial days and involved 122 Prosecution witnesses, 2721 Prosecution exhibits, 1643 Defence exhibits, and transcripts of some 28,000 pages. Judgement was pronounced on 26 February 2001. Dario Kordić was sentenced to 25 years' imprisonment and Mario Čerkez to 15 years' imprisonment. Time from each sentence was deducted for the period each had spent already in ICTY custody.

This comment explores the Kordić and Čerkez Judgement of 26 February 2001,[2] in order to highlight its contribution to ICTY jurisprudence on the Statute's crimes, principles of individual criminal responsibility and the defence of self-defence. We therefore first review the substance of the Indictment, the alleged role of the two co-accused and the charges. Next, we analyze and evaluate the Trial Chamber's application of law, noting the various positions of Prosecution and Defence. Finally, we consider the issues of cumulative charges and sentencing, before making some concluding remarks.

II. The Allegations

A. Background

The amended Indictment of 30 September 1998,[3] situates the alleged crimes of the two accused in the context of the disintegration of the former Yugoslavia, including the independence of the Republic of Croatia (which took effect on 8 October 1991), and the independence of the Republic of Bosnia and Herzegovina (which took effect on 3 March 1992). In this situation, an influential political party in Croatia, the Croatian Democratic Union (HDZ), and another Bosnian Croat organization, the Croatian Democratic Union of Bosnia and Herzegovina (HDZ-BiH), assumed a lead role in Croat efforts to secede forcibly from Bosnia and Herzegovina in order to bring ethnic Croats within a single, enlarged Republic of Croatia. The Croat secessionist movement found concrete political expression in the establishment of the Croatian Community of Herceg-Bosna (HZ H-B) on 18 November 1991, its declaration of independence from Bosnia and Herzegovina and its transformation into the 'Croatian Republic of Herceg-Bosna' (HR H-B) on 28 August 1993, in which Kordić served as Vice-President. However, the international community refused to recognize this new claimant to sovereign statehood, and in fact, in September 1992, the Constitutional Court of Bosnia and Herzegovina had already declared it illegal. The Indictment alleges that members of the Croatian

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[1] 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, approved by Security Council Resolution 827 (1993), adopted on 25 May 1993.

[2] ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, T. Ch. III, 26 February 2001, in this volume, p. 249, "Judgement."

[3] ICTY, Amended Indictment, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, 30 September 1998.

Defence Council (HVO)[4] – which functioned as the HZ H-B's and HR H-B's supreme executive, administrative and defence authority – perpetrated serious violations in the course of the Croat drive for secession from Bosnia and Herzegovina in the ethnically mixed strategically important Lašva Valley of Central Bosnia.

The Lašva Valley, bounded by mountainous terrain, held considerable strategic importance for the roads that cut through it and armaments factories located there. The Valley had a population of around half a million, 48% of whom were Muslim, 32% Croat and 10% Serb. The Prosecution alleged that from around November 1991 to March 1994, the HVO and their various associate bodies and militia, committed crimes under international law against Muslims living in the Lašva Valley as part of a campaign of persecution and ethnic cleansing in Bosnia and Herzegovina.[5] The Indictment alleges that in January and April 1993, the HVO massacred more than 100 Bosnian Muslims, including many women and children in the Lašva Valley town of Ahmići, and attacked Bosnian Muslim villages in the south of the Valley, in a pre-meditated, widespread and systematic manner. Shelling typically commenced in the early morning hours, followed by house-to-house raids by groups of soldiers, during which civilians were killed, maimed or detained, and their houses burnt down. Civilians were also taken hostage and forced to act as 'human shields' and to dig trenches, in many cases, under fire. In another series of attacks conducted in June 1993, the HVO attacked certain Bosnian Muslim villages in order to acquire control of Kiseljak municipality and to remove the Bosnian Muslim population living there. In October 1993, the HVO allegedly attacked the town of Stupni Do, again massacring and expelling Muslim civilians and destroying their homes.

B. The Alleged Roles of the Accused

Dario Kordić

Kordić can be considered the first of the 'big fish' defendants to have come before the ICTY. Born in 1960 in Sarajevo, Bosnia and Herzegovina, Kordić studied political science before working as a journalist. His influence grew during the ethnic strife that tore apart the former Yugoslavia. In 1991, he was named President of the HDZ-BiH in the municipality of Busovača and President of the Travnik Regional Community. In the latter capacity, he co-chaired a meeting in November 1991 that declared the Community's resolve to create a joint Croatian State. A few days later, Kordić signed a Decision establishing the HZ H-B and became one its two Vice Presidents, keeping this position until around August 1993. He was also a member of the HZ H-B Presidency which functioned as the legislative body of the internationally unrecognized 'Croatian Republic of Herceg-Bosna'.

According to the Indictment, Kordić exercised a high level of responsibility. He became President of the HDZ-BiH in July 1994, and regularly represented himself as an HVO Colonel, Vice President or other senior HVO official. He dressed in military attire and had a military operations room in his office. He signed orders and documents and exercised actual power, command and authority over HVO political and military decision making and operations, including cease-fire agreements, and he was recognized by others as a commander. The Indictment also alleges that his authority extended over the appointment and dismissal of individuals from various official posts and the issuance of arrest and release orders of influential Muslims detained by the HVO. Kordić also authorized travel and movement through various HVO-controlled territories, and personally and through local commanders conducted negotiations relating to the passage of United Nations convoys and humanitarian assistance delivery through checkpoints. The Indictment alleges that Kordić played a direct role in the launching of attacks against Bosnian Muslim towns and villages.

The Kordić Defence countered that he was only a politician rather than part of a military command structure, that his only role was to rouse the ethnic Croat population to defend itself, and that in any case, even his political influence had been purely local in nature.

[4] The HVO was formed in April 1992, followed in June 1992 with the establishment of municipal level HVOs, that were also accountable to the HZ H-B Presidency.

[5] *Op. cit.* note 3.

Mario Čerkez

Born in 1959 in a village called Rijeka, Bosnia and Herzegovina, Čerkez worked as a car mechanic and clerk, before becoming the commander of the HVO brigade in Vitez in 1992, in which position he remained during all times relating to the crimes charged in the Indictment. He served under the command of Tihomir Blaškić, the then HVO Operative Zone Commander in Central Bosnia. According to an October 1992 Decree on the Armed Forces of the Croatian Community of Herceg-Bosna, commanders of the rank that Čerkez held were responsible for maintaining the combat readiness and mobilization of troops, armed forces and police under their command. The Indictment alleged that Čerkez exercised control over military operations within his scope of competence, including the negotiation of cease-fire agreements with the United Nations and with civilian and military leaders of the Muslim community. He was also responsible for ordering troop deployment and controlling the detention and treatment of civilians. Čerkez was further alleged to have been a military commander of substantial authority and influence who took an active part in and commanded troops responsible for ethnic cleansing and persecution of Bosnian Muslims.

The Čerkez Defence contended that he was not a commander of all HVO units in the areas where the crimes were alleged to have been committed, that his soldiers did not commit any of the crimes alleged, and that he had taken measures to instruct his soldiers in international humanitarian law. Moreover, the Defence argued that Čerkez had had no involvement in the internment of civilians, their use in the digging of trenches or as human shields, and that on the day of the Ahmići attack, his Brigade was deployed elsewhere and therefore that he could not bear any responsibility for acts the Brigade could not possibly have committed.

Both Defence teams denied the existence of any Croat plan to secede from Bosnia-Herzegovina or to launch a campaign of persecution, ethnic cleansing or systematic serious human rights violations. They characterized the various Bosnian Croat organizations alleged to have perpetrated such violations, not as instruments of Croat aggression against Bosnian Muslims, but as groups essential for Croat defence against Bosnian Serb attacks and expulsions being conducted in the Lašva Valley. The town of Ahmići therefore had to be considered a legitimate military target, and any excesses that might possibly have been committed, were carried out by groups other than those associated with the accused. The Defence also contended that Stupni Do was a legitimate military target and that any civilian deaths were caused simply by the excesses of individual troops rather than by any deliberate policy or strategy.

C. General Allegations

The Prosecutor alleged that[6] each act or omission relating to a charge of crime against humanity was perpetrated as part of "widespread, large-scale or systematic acts and conduct directed against Bosnian Muslim civilian populations residing in the HZ H-B/HR H-B and the municipality of Zenica, in the territory of Bosnia and Herzegovina". It asserted that a state of international armed conflict and partial occupation existed on the territory of the Republic of Bosnia and Herzegovina at all times relating to the charges of grave breaches of the 1949 Geneva Conventions, as prohibited by Article 2 of the ICTY Statute, and that all of the victims were at all relevant times 'protected persons' under the 1949 Geneva Conventions. Kordić and Čerkez were therefore bound by the laws and customs of war, including the 1949 Geneva Conventions.

Kordić was alleged to be individually responsible for acts committed between November 1991 and March 1994 under Article 7, paragraph 1, of the Statute which provides that: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime", as well as under Article 7, paragraph 3, which provides for the responsibility of the superior for acts prohibited by Articles 2 to 5 of the Statute. The Prosecution alleged that Čerkez was individually responsible for acts committed from around April 1992 until August 1993, also under Articles 7, paragraph 1, and 7, paragraph 3.

D. Specific Charges

The Trial Chamber conveniently grouped the specific counts in the Indictment as follows:

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[6] *Op. cit.* note 3 at par. 4-22.

1. **persecution on political, racial or religious grounds as a crime against humanity**. This charge relates to allegations of the widespread or systematic persecution of Bosnian Muslim civilians, including attacks that involved killing and maiming, detention, expulsions, forced digging of trenches and use as human shields, forced transfer from their homes, promotion of ethnic hatred, destruction and plunder of private property and destruction of places of worship (counts 1 and 2);
2. **violations of the laws or customs of war**, in particular, those arising from attacks on civilians and civilian property and wanton destruction not justified by military necessity (counts 3-6);
3. **crimes against humanity, grave breaches and violations of the laws or customs of war** relating to wilful killing, murder and inhuman treatment of Bosnian Muslims and inhumane acts against them (counts 7-20);
4. **crimes against humanity, grave breaches and violations of the laws or customs of war** relating to the imprisonment and inhuman treatment of Bosnian Muslims, the taking of hostages and the use of human shields (counts 21–36); and
5. **grave breaches and violations of the laws or customs of war** in relation to destruction and plunder of Bosnian Muslim property and destruction of their religious and educational institutions (counts 37-44).

Kordić was alleged to have played the central role in creating and executing the policies and strategies of the HDZ-BiH, HZ H-B, HR H-B and HVO to persecute and terrorize Bosnian Muslims. He is alleged to have wielded power, authority and responsibility to direct and control these policies and to have been in a position to prevent, limit or punish serious violations of international humanitarian law over a wide range of municipalities in the Lašva Valley. The Prosecution charged that he was aware of or had reason to know of the likely consequences of his policies, and that the harm he caused Bosnian Muslims had been 'fully foreseeable'. Moreover, he is alleged to have known or to have had reason to have known that his subordinates and associates were about to persecute Bosnian Muslims, or had done so, and that he had failed to take the necessary and reasonable measures to prevent such persecution or to punish the perpetrators.

As for Čerkez, the Prosecution alleged that in his role as commander of the HVO Vitez Brigade which participated 'directly and actively' in widespread persecution of Bosnian Muslims, Čerkez "knew or had reason to know that various subordinates and aiders and abetters under his control were about to persecute and oppress Bosnian Muslim civilians, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."[7] The Prosecution detailed also the inhumane conditions of detention and imprisonment of Bosnian Muslims which involved physical and psychological abuse, beatings, sexual assault, and deprivation of food, water, shelter, clothing and medical attention in overcrowded and unsanitary conditions.

III. General Requirements for the Application of Articles 2, 3 and 5 of the Statute

The Trial Chamber referred to the requirement that, in order for there to be a violation of Articles 2 or 3 of the Statute, there must be a sufficient link between the act in question and the armed conflict. Otherwise, the act, although perhaps criminal in nature, might constitute an ordinary crime only, rather than a violation of international humanitarian law which applies only in time of armed conflict. In this regard, it is important to recall that the purpose of international humanitarian law is to protect persons and property in time of armed conflict, and basically to address the particular kinds of violations that frequently attend war, rather than to address all crimes or to replace the domestic criminal law of the State. The difficult question however has always been to decide upon the kind and extent of connection required between the crime committed and the existence of an armed conflict for the purpose of establishing individual criminal responsibility in particular cases. The Appeals Chamber Judgement in the Tadić Case held that as regards Article 5 "A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the [Tadić Trial] Judgement."[8]

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[7] Par. 27 of the Judgement.

[8] Par. 33 of the Judgement, citing ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter ALC-III-761, par. 251.

The Trial Chamber then stated that it was "in no doubt that a clear nexus exists between the armed conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina and the acts alleged in the Indictment to have been committed by the two accused persons."[9] In paragraph 34 of the Judgement, the Trial Chamber noted also that the "Indictment charges Dario Kordić with crimes committed in his capacity as the Vice-President of the HZ HB, in which capacity he is alleged to have played a central role in developing and executing the policies of the HZ HB and the HVB" and with regard to Mario Čerkez that he "is charged in his capacity as commander of the Viteska Brigade of the HVO."

IV. Application of Specific Provisions under Articles 2, 3 and 5 of the Statute

A. Persecution as a Crime against Humanity

Following the Kupreškić Trial Judgement holding[10] that the crime of persecution encompasses crimes not enumerated elsewhere in the Statute, the Trial Chamber extended ICTY jurisdiction *ratione materiae* over any acts that consisted:

1. of a gross and blatant denial;
2. on discriminatory grounds;
3. of a fundamental right, laid down in a customary or treaty law; and that
4. reached the same level of gravity as the other crimes against humanity in Article 5 of the Statute.

Here, the ICTY seems to have applied a potentially rather broad set of criteria, considering that any 'fundamental right laid down in customary *or* treaty law' could include freedom of association, assembly, right to work, right to form labour unions etc.

The obvious response is that no violation of any fundamental right would come within the ICTY's competence, according to the Kupreškić test, unless the right was denied on a gross and blatant basis and was also sufficiently grave in nature. However, who is to decide whether the violation was gross, blatant and grave? These criteria are not supplied anywhere in customary or treaty law and therefore the Kupreškić test if applied too broadly, risks violating the principle of *nullum crimen sine lege* as regards the crime of persecution. To its credit, the Trial Chamber did not accept the Prosecution argument that the "same level of gravity" test of Kupreškić should be dropped on the grounds that "although the realm of human rights is dynamic and expansive, *not every denial of a human right may constitute a crime against humanity*" [emphasis added]. In fact, the Trial Chamber went further, introducing another rather ambiguous notion – that of 'cumulative effect'. Paradoxically, the Trial Chamber stated that the nature of the crime of persecution derives from its 'cumulative effect' to be "evaluated not in isolation but in context", but on the other hand, that "a single act may constitute persecution" as long as there is "clear evidence of the discriminatory intent".

After considering persecution in relation to 'attacking cities, towns and villages', 'trench-digging and use of hostages and human shields', 'wanton destruction and plundering', 'destruction and damage of religious or educational institutions', the Trial Chamber then considered persecution in relation to acts *not* enumerated in the Statute, based on bits and pieces of norms as evidenced in provisions of the Genocide Convention and the International Covenant on Civil and Political Rights, the opinion of Professor Manfred Nowak thereon, and cases of the International Military Tribunal at Nuremberg and ICTR as well as sundry provisions in the laws of Germany, the United States, Yugoslavia, South Africa, Canada and France. Fortunately, for the Defence, the Trial Chamber considered that the so-called 'crime' of 'encouraging and promoting hatred on political etc. grounds' did "not rise to the same level of gravity as the other acts enumerated in Article 5" and that this had "not attained the status of customary international law."[11] The Trial Chamber repeated this exercise in regard to the so-called crime of 'dismissing and removing Bosnian Muslims from government etc', finding that it did not "rise to the same level of gravity as the other crimes against humanity enumerated in Article 5" nor had it attained the status of customary international law. The Trial Chamber quoted from the *Einsatzgruppen* Case to the effect that only persecution on a nation-wide level "designed to make life

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9 Par. 35 of the Judgement.

10 Par. 193-195 of the Judgement, citing ICTY, Judgement, *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, Papić and Santić*, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, Klip/Sluiter ALC- IV-703, par. 621.

11 Par. 209 of the Judgement.

intolerable for, or to exterminate large groups of people" constituted persecution in the sense of international criminal law.

B. Wilful Killing and Murder

The Trial Chamber then considered the arguments of the parties with respect to 'wilful killing' under Article 2 and 'murder' under Articles 3 and 5 together, accepting the Prosecution's argument that: "the specific elements of wilful killing under Article 2 are the same as those of murder under Articles 3 and 5 and therefore the submissions apply equally in respect of the crimes."

The Trial Chamber then entertained the Prosecution's submission that: "... the crime of wilful killing comprises the following elements: (i) the death of the victim, (ii) an act or omission of the accused as a substantial cause of the death and (iii) the accused's intended to kill or inflict serious injury in reckless disregard of human life".[12] The Trial Chamber did not have to mention the Article 2 requirement that the victims must have been persons protected under the Geneva Conventions because it had explained this already under "General Requirements for the Application of Articles 2, 3 and 5".

The Kordić Defence submitted that instead of only "an act or omission of the accused [that] was a substantial cause of the death" the accused had to have "directly caused the death of the victim,"[13] and that instead of mere "reckless disregard of human life" as the Prosecution contended, the accused had to have "intended to commit the conduct causing the victim's death" and moreover that "the accused intended to kill the victim" in the sense that the accused knew "with virtual certainty that the death of the victim would result from his activities."[14] The difference in the *mens rea* requirement is an important one which pertains also to the level of culpability relating to different degrees of homicide, in particular, between premeditated intention on the part of the accused to kill, in contrast to mere intention to inflict serious injury in reckless disregard to human life that results in the death of the victim. The Trial Chamber seems not to have considered this important distinction, stating simply that "To satisfy the *mens rea* for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life."[15] The effect of the Trial Chamber's acceptance of the Blaškić and Čelebići tests for 'wilful killing,'[16] together with its assimilation of 'wilful killing' with the crime of 'murder' is to lower the *mens rea* threshold of the ICTY's elements of 'murder'.

Similarly, the Prosecution had first submitted that the offence of murder in Article 3 of the Statute required that:

"1. the occurrence of acts or omissions caused the death of the victim;
2. the acts or omissions were committed wilfully;
3. the victims of the acts or omissions were taking no active part in the hostilities as per Common Article 3 of the Geneva Conventions;
4. there was a nexus between the acts or omissions and an armed conflict; and
5. the accused bears individual criminal responsibility for the destruction or devastation under Article 7(1) or 7(3)."[17]

Missing from the above definition put forward by the Prosecution is the essential requirement of specific intent to commit murder unless we assume 'committed wilfully' covers this.

One could easily envisage a situation where an accused wilfully commits an act, for example, to authorize the transfer of certain POWs from one detention centre to another, which accidentally causes the death of one POW in a road traffic collision between the vehicle transporting the POWs and an oncoming UNPROFOR vehicle which fails to stop at a traffic intersection red light. If we consider that both the transfer

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13 Par. 223 of the Judgement.
14 Par. 224 of the Judgement.
15 Par. 224 of the Judgement.
16 Par. 229 of the Judgement.
17 See Lyal S. Sunga, The Celebici Case: A Comment on the Main Legal Issues, Leiden Journal of International Law 2000, p. 105-128.

of detainees and the unlucky presence of UNPROFOR are both connected to an armed conflict, and that the accused bears individual criminal responsibility for destruction or devastation under Articles 7, paragraph 1, or 7, paragraph 3, and that the transfer itself was committed wilfully, would we then have to conclude that the accused was responsible for *murder* even where he had no specific intent whatsoever to commit murder? Would it not make more sense to find the accused guilty of some other offence, such as manslaughter or negligence causing death? Faced with this ambiguity, it seems that the Prosecution amended its brief, stating its opinion that: "the underlying offence of wilful killing under Article 2, and the crime of murder as provided for in Common Article 3 and Article 5 of the Statute, apart from their respective jurisdictional conditions, require the same *actus reus* and *mens rea*"[18], which is another way of saying that 'wilful killing' and 'murder' are exactly the same thing in terms of actual act and specific intent associated with it except that, as the Trial Chamber finds: "under Article 3 of the Statute the offence need not have been directed against a "protected person" but against a person "taking no active part in the hostilities."[19]

Turning to 'murder' under Article 5, the Trial Chamber noted that the "Prosecution agrees with the Čelebići Trial Chamber that the *actus reus* of murder requires the death of a victim,"[20] instead of merely stating what should be an extremely obvious point. The Defence argued a less obvious point, arguing that murder cannot be committed by omission, but only by the direct act of the accused causing the death of the victim. The Defence argument raises questions as to the degree of causal proximity, either by commission or omission, of the accused to the act of killing by the direct perpetrator – an issue we consider more fully below in connection with the application of Article 7 of the Statute.

The Trial Chamber noted the Blaškić Trial Chamber's holding that premeditated intent does not form an essential requirement of the crime of murder and that ICTY jurisprudence on the concept of murder approximates '*meurtre*' rather than '*assassinat*' in French. The Trial Chamber ultimately held that:

"In order for an accused to be found guilty of murder, the following elements need to be proved:

– the death of the victim;
– that the death resulted from an act or omission of the accused or his subordinate;
– that the accused or his subordinate intended to kill the victim, or to cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death."[21]

The Trial Chamber added that these elements were identical to 'wilful killing' under Article 2 and 'murder' under Article 3 of the Statute, except for the additional requirement that: "in order to be characterised as a crime against humanity a 'murder' must have been committed as part of a widespread or systematic attack against a civilian population."[22] The Trial Chamber perhaps felt some discomfort with its own position because it stated in footnote 314 that: "Although the *Kupreškić* Trial Judgement defined murder as an "intentional and premeditated killing", it did not refer to the latter element in its factual findings." The Trial Chamber also stated that: "The *Kupreškić* and *Blaškić* Trial Judgements both refer to the International Law Commission's view that "Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation."[23] Bearing in mind the principle of *nullum crimen sine lege* and the defendant's right to mount an effective defence, the reader must be forgiven for feeling some unease at the Trial Chamber's adoption of the ILC's 'we know murder when we see it' approach.

C. Offences of Mistreatment

Turning to the charges of offences of mistreatment, the Prosecution alleged that Kordić and Čerkez committed acts that involved 'wilfully causing great suffering or serious injury to body or health' within the

[18] Par. 233 of the Judgement.
[19] Par. 233 of the Judgement.
[20] Par. 234 of the Judgement.
[21] Par. 236 of the Judgement.
[22] Par. 236 of the Judgement, see ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/Sluiter ALC-III-761, at par. 248 where the Appeals Chamber set 'widespread or systematic attack against a civilian population' as part of the threshold requirement for an act to come within the Article 5 definition of 'crime against humanity'.
[23] Footnote 316 of the Judgement.

meaning of Article 2 of the Statute, 'inhuman treatment' and 'violence to life and persons' (under Article 3 of the Statute) as well as 'inhumane acts' (a violation of Article 5 of the Statute). Moreover, Kordić and Čerkez were alleged to have participated in the inhuman and / or cruel treatment of detainees amounting to a violation of the Article 2 crime of 'inhuman treatment' and Article 3 as 'cruel treatment'. Kordić and Čerkez were also alleged to have participated in the use of Bosnian Muslims as 'human shields' under the head of 'inhuman treatment' (Article 2) and 'cruel treatment' (Article 3).

With regard to 'wilfully causing great suffering or serious injury to body or health', the Prosecution argued that 'wilfully causing' could comprise omissions as well as acts, and that 'serious injury' could entail not only physical suffering, but also injury to mental health, invoking the Trial Chamber's holding in the Čelebići Case that moral suffering fell within this ambit. In terms of the level of gravity or intensity, the Prosecution argued for the application of a low threshold, contending that 'serious' meant any level of injury greater than 'not slight or negligible'. The Kordić Defence on the other hand submitted that Kordić could only be found guilty where:

"(i) the victim experienced serious injury to body or health;
(ii) the accused committed an unlawful act that directly caused the victim to experience serious injury;
(iii) the accused intended to commit the conduct that caused the victim to experience the serious injury, and intended for the victim to experience serious injury ..."[24]

The Defence thereby urged the interpretation of the word 'serious' as understood in plain language. Also, by referring to 'committed', the Defence sought to restrict the notion of the *actus reus* to exclude omissions. Moreover, Defence Counsel submitted that the accused had to have intended to commit the particular conduct with the specific intention to seriously injure the victim. The Defence also added a fourth requirement to the crime, namely that "justification was lacking", arguing that mere recklessness could not suffice to fulfil the necessary *mens rea* element. The Čerkez Defence also argued that the Prosecution had the evidentiary burden to prove the victim's injuries by reference to medical documentation, or at a minimum, a detailed description.

In considering the issue, the Trial Chamber noted straightaway that the ICRC Commentary to Geneva Convention IV interprets the phrase 'wilfully causing great suffering' as distinct from torture or biological experiments on account of the ends for which the act was performed. The Commentary opines that 'wilfully causing great suffering' could "be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism" and that it could "quite legitimately be held to cover moral suffering also".[25] Interestingly, the Commentary, relying on guidance from domestic law, interprets the level of seriousness as related to 'the length of time the victim is incapacitated for work'.

Following the Trial Chamber's Judgement in the Čelebići Case, the Trial Chamber accepted the Prosecution's argument to include mental suffering within the meaning of 'serious injury to body or health' as per the ICRC Commentary. In itself, this approach accords fully with international human rights law norms on torture that encompass mental as well as physical suffering.[26] As for the extent of seriousness required to bring an injury within the ambit of the Statute's provision, the Trial Chamber test seems somewhat circular and to that degree unhelpful because it states that in order for suffering or injury to qualify as a crime under the Statute, it: "must occasion suffering or injury of the requisite level of seriousness,"[27] without indicating how to determine this.

Ultimately, the Trial Chamber held that:

"... the crime of wilfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven. This crime is distinguished from that of inhuman treatment in that it

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[24] Par. 240 of the Judgement.
[25] See Commentary to Geneva Convention IV of 12 August 1949, at 599.
[26] See Article 1 of UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the General Assembly 10 December 1984, opened for signature 4 February 1985, entered into force 26 June 1987.
[27] Par. 244 of the Judgement.

requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence. Provided the acts of causing injuries alleged in the Indictment meet the requirements set forth by the Trial Chamber, they may be characterised as the crime of wilfully causing great suffering. As with all offences charged under Article 2 of the Statute, there is a further requirement that the acts must have been directed against a "protected person."[28]

In this way, the Trial Chamber drew a distinction between great suffering etc. and humiliation or other violations of human dignity that do not necessarily involve 'serious mental or physical injury'. In terms of the basic principle that 'the punishment should fit the crime', this distinction would seem to be an important one to maintain. Intuitively, there does seem to be something more indelible about serious physical or mental injury that inflicts pain upon the victim over a lifetime as compared to an incident that is not necessarily related to physical or mental shock or trauma, and which therapy or counselling could perhaps limit over the longer term. Yet it is also easier to distinguish one crime from another in the abstract, than in actual fact: an instance of inhuman treatment could turn out worse for the victim in terms of the intensity and duration of suffering as compared to acts which, because of their intensity at the moment seem to qualify more as 'serious injury to body or health', rather than mere 'inhuman treatment', depending on the circumstances in question and the particular vulnerabilities of the victim. Might not the forced parading of a woman naked in front of the people of the town in which she lived cause greater mental shock than serious bodily injury in the form of a broken arm? Does it follow that all cases of inhuman treatment have to be considered offences lesser than 'serious injury to body or health' regardless of the fact that, in some cases, inhuman treatment might be worse for the victim than serious injury to body or health?

Turning to the crime of 'inhuman treatment' as covered in Article 2 of the Statute, the Prosecution contended that it consists of: 'infliction of serious mental or physical suffering or injury, or a serious attack on human dignity' combined with the accused's *mens rea* to inflict such suffering or to attack human dignity. Right away, one sees that inhuman treatment, as the Prosecution defined it, overlaps with the 'great suffering or serious injury to body or health' element of Article 2, sub c, if we consider that 'serious mental or physical suffering or injury' equates to 'great suffering or serious injury to body or health', but inhuman treatment includes also the lesser offence of 'serious attack on human dignity'. On the other hand, the Prosecution also postulated that neither physical injury nor injury to health is required to qualify an act as inhuman treatment, prohibited under the Geneva Conventions, and that this norm should be interpreted to cover inadequate living conditions for detainees.[29] The logical question then becomes, given that the crime of 'wilfully causing great suffering or serious injury to body or health' already includes 'serious injury to body or health', what value, from a legal point of view, is there in defining 'inhuman treatment' also as possibly, but not necessarily, involving 'infliction of serious mental or physical suffering or injury'?

The Prosecution wished to have it both ways. It charged the accused with 'inhuman treatment' for an act that involved 'serious mental or physical suffering or injury' in a way that would link the act in question to 'torture' and 'biological experiments' also mentioned in Article 2, sub b, thereby connoting a higher level of culpability. However, if the Prosecution failed to establish that the level of 'serious injury to body or health' constituted 'inhuman treatment' under Article 2, sub b, it could always prosecute the same act under the head of 'wilfully causing great suffering or serious injury to body or health' under Article 2, sub c.

Another ambiguity arises with regard to the difference in the requisite *mens rea* between 'wilfully causing great suffering or serious injury to body or health' and 'inhuman treatment' because the Trial Chamber seemed to agree with the Prosecution that, with regard to the former crime, as long as the act was deliberate, there was no need to establish specific intent on the part of the perpetrator to have caused great suffering or serious injury. In this connection, the Defence argument on this point seems more pertinent in the sense that it would require an accused to have had the specific intent to cause great suffering or serious injury. Without this requirement, an accused could be held liable for a very serious crime where he or she did not have the specific criminal intent to cause such degree of harm although the act in question may have been deliberate. One could imagine, for example, a case where a camp guard deliberately pushed a detainee into a ditch of

[28] Par. 245 of the Judgement.
[29] Par. 247 of the Judgement.

three metres depth, but without specific intent to cause great suffering or serious injury to the detainee, merely to get him or her to complete the digging of a trench, but suppose that, unluckily, the detainee when pushed, struck his head against a stone no one knew was protruding from the side of the ditch, causing cerebral haemorrhage, disabling him for life. If we were to adopt the much lower threshold offered by the Prosecution, it would seem that, even accidental injury caused by rough handling might impose a high level of criminal responsibility upon the camp guard. Would this not result in an injustice?

The Prosecution added that "in the final analysis, deciding whether an act constitutes inhuman treatment is a question of fact to be ruled on with all the circumstances of the case in mind."[30] However, this could lead to much uncertainty in the law. To consider that we can only identify 'inhuman treatment' when we see it as a matter to be decided purely on a case-by-case basis, could in effect amount to an admission of incapability to define a particular crime with sufficient specificity and clarity in the abstract. This in turn could evacuate the norm prohibiting 'inhuman treatment' of its deterrent value, and weaken its legality as well.

Arguing along these lines, the Kordić Defence insisted that 'inhuman treatment' must have a serious physical component, even if the suffering could be either physical or mental, otherwise such a crime would lack sufficient definition to be applied prospectively. The Defence bolstered its argument by relying on a case of the European Commission on Human Rights which held that certain measures such as solitary confinement, constant artificial lighting and lack of physical exercise, did not constitute inhuman treatment, where the need to ensure security and to prevent escape could be put forward as valid justification for the measures taken.

Adopting the line taken in the Čelebići Trial Chamber Judgement, the Kordić and Čerkez Trial Chamber accepted the Prosecution's view that "inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity"[31] as long as the victims were 'protected persons' as so required under Article 2 of the Statute, and moreover, that the use of human shields constituted a form of inhuman treatment. The upshot of this approach is that the infliction of 'serious mental harm or physical suffering or injury' could come either within the definition of 'wilfully causing great suffering or serious injury to body or health' or the crime of 'inhuman treatment' and the difference if any remains unclear, except that 'inhuman treatment' is broader in scope because it also encompasses 'a serious attack on human dignity' without any requirement of the infliction of serious mental harm or physical suffering or injury. At least, the Trial Chamber properly excluded individual criminal responsibility for accident, but it still retained the looseness inherent in the concept of a 'deliberate act' which might still be less than specific intent, and could therefore fall below the threshold of basic criminal justice. The Trial Chamber could have been more clear as to whether its reference to 'intentional act' was meant to refer to specific intent to commit a criminal act (which would satisfy the normal concept of *mens rea*) or rather only intention to commit an act that caused great suffering (which would be akin more to gross negligence). To recall our earlier example, would the Trial Chamber's reference to 'intentional act' cover the camp guard's intentionally pushing the detainee into the three-metre deep ditch or rather only a specific intention to cause great suffering?

Turning to the charges involving 'violence to life and person' in connection with Article 3 of the Statute, the Trial Chamber first noted the Prosecution's argument that the elements of the offence consisted of:

"(1) the occurrence of acts or omissions causing death or serious mental or physical suffering or injury;
(2) the acts or omissions were committed wilfully;
(3) the victims of the acts or omissions were persons taking no active part in hostilities pursuant to Common Article 3 of the Geneva Conventions;
(4) there was a nexus between the acts or omissions and an armed conflict; and
(5) the accused bears individual criminal responsibility for the acts or omissions under Article 7(1) or 7(3) of the Statute."[32]

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30 Par. 248 of the Judgement.
31 Par. 256 of the Judgement.
32 Par. 257 of the Judgement.

and that "[t]he offence of violence to life and person covers a panoply of criminal conduct that includes murder."[33] The Trial Chamber then expressed its agreement with the Blaškić Trial Chamber, holding that the offence of 'violence to life and person' derives from the elements of Article 3, paragraph 1, sub a, common to the four Geneva Conventions, which the ICTY recognized to apply to non-international armed conflicts as well as to situations of international armed conflict.

Article 3 of the Statute concerns violations of the laws or customs of war in terms of the classic balance to be struck between humanitarian considerations and the requirements of military necessity as to mitigate as far as possible unnecessary suffering in the conduct of hostilities. However, Article 3 of the ICTY Statute refers explicitly to 'violence to life and person', 'cruel treatment' and indeed to 'murder'. To the casual reader, it therefore appears that the Trial Chamber has 'read in' all these elements as well as the contents of Article 3 common to the four Geneva Conventions into Article 3 of the Statute by some, perhaps unwarranted, act of judicial activism. Yet, the Trial Chamber's approach follows from the established jurisprudence of the ICTY which in the Tadić Case, held that Article 3 had to be considered as a residual clause that sweeps in: "*all violations* of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap)".[34] On that occasion, the Tadić Appeals Chamber had stated that: "Article 3 thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4 or 5" and therefore that "Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal" and that "Article 3 aims to make such jurisdiction watertight and inescapable."[35] Although these elements of the Tadić Majority Appeals Opinion certainly enhance the normative coherence of Statute interpretation, they also risk sending the ICTY on a blissful law-making voyage that strays beyond the plain language of ICTY provisions. This accounts for the Trial Chamber in Kordić and Čerkez having to entertain Prosecution and Defence arguments on elements of crimes such as 'cruel treatment' and 'violence to life and property' in relation to Article 3 of the Statute that do not appear there. Perhaps uncomfortable with stretching Article 3 too far, the Trial Chamber in Kordić and Čerkez set certain limits, ruling that: "where the act did not result in the death of the victim, it may be better characterised as "wilfully causing great suffering " or "inhuman treatment" under Article 2 of the Statute."[36]

Concerning cruel treatment, the Trial Chamber followed the Čelebići Trial Chamber holding that 'cruel treatment' in the context of the Geneva Conventions grave breaches provisions equates to 'inhuman treatment'.

As for the meaning of 'other inhumane acts' in Article 5, sub i, of the Statute, the Trial Chamber noted straightaway that this phrase functions clearly as a residual category and that it shared the Tadić Trial Chamber's view that 'inhumane acts' must be of similar gravity as the other crimes committed in Article 5, to bring them within the scope of Article 5. Whereas the Prosecution contended that no specific intent on the part of the alleged perpetrator had to be proven, the Kordić Defence argued that 'inhumane acts' "must have been committed with a specific intent to take part in the furtherance of formal government policy or plan and with discriminatory intent."[37] For its own part, the Čerkez Defence held that inhumane treatment was in effect an act of violence which although falling short of torture, was characterized by premeditation, extended duration, intense physical and mental pain and 'acute psychiatric disturbance'.

In deciding on the meaning of 'inhumane treatment', the Trial Chamber recalled that the Kupreškić Trial Chamber considered that 'inhumane acts' had to be perpetrated 'in a systematic manner and on a large scale' in order to exhibit a level of seriousness sufficient to bring them within the ambit of Article 5. The Tadić Trial Chamber, on the other hand, had established that 'other inhumane acts', while a residual category for crimes against humanity, had at least to involve 'injury to a human being in terms of physical or mental

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[33] Par. 259 of the Judgement.

[34] ICTY, Decision of the Appeals Chamber on the Defence Motion of the Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, Klip/Sluiter ALC-I-33, par. 87.

[35] Par. 91 of the Judgement.

[36] Par. 260 of the Judgement.

[37] Par. 267 of the Judgement.

integrity, health or human dignity' – a requirement that sets apart 'other inhumane acts' from mere humiliation or degrading treatment. The question then becomes 'what are the elements of 'serious bodily or mental harm' that can distinguish mere humiliation, rough treatment, or lesser forms of unpleasant treatment from 'inhumane acts'? Here, it would have been valuable if the Trial Chamber had cited some elements to indicate concretely to potential perpetrators the boundaries of permissible acts. Instead, the Trial Chamber made a somewhat empty observation that: "the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances."[38] Although this observation does not appear very satisfactory, one has to concede that realistically it is probably difficult or perhaps even impossible, for any court to define 'bodily or mental harm' with much precision in the abstract simply because the infliction of suffering always involves certain subjective aspects that are difficult to verify objectively, such as the effect of physical violence or threats against the victim. The Trial Chamber added that the suffering must have resulted from an act of the accused or his or her subordinate and must have involved the intent to cause serious bodily or mental harm upon the victim, thereby rejecting the Prosecution's contention that 'inhumane acts' were not necessarily associated with a specific intent requirement.

D. Unlawful Confinement of Civilians and Imprisonment

Under Article 2, sub g, of the Statute, 'unlawful confinement' is prohibited as a grave breach of the Geneva Conventions, while 'imprisonment' could constitute a 'crime against humanity' under Article 5 of the Statute under certain circumstances. The Prosecution argued that the confinement of a civilian was permissible where the civilian was "definitely suspected of or engaged in activities hostile to the security of a State",[39] conceding that it was not enough that the civilian merely differed from the State politically. Moreover, the process to differentiate ordinary civilians from those who posed a threat to State security could not be taken against a group as a collective entity, but rather only on an individualized basis. The Prosecution underlined that, in any case, the Detaining Power was under an obligation to ensure basic procedural safeguards, in particular to have the action to detain a particular civilian in question "reconsidered as soon as possible by an appropriate court or administrative tribunal" as well as reviewed periodically thereafter, and in no case, not less than twice yearly, as per Article 43 of the Fourth Geneva Convention.

In contrast, the Kordić Defence urged the Trial Chamber to recognize a wider ground for the lawful confinement of civilians in the hope of narrowing the accused's chances of conviction, contending that unlawful confinement only came within the sense of Article 2, sub g, where: 1) the acts directly caused civilians to be unlawfully confined; 2) the acts of the accused were committed with specific intention to unlawfully confine the victim; 3) the victims were protected persons under the Fourth Geneva Convention; 4) the acts occurred during an international armed conflict and were connected to the conflict; and 5) the accused bore responsibility under Article 7, paragraph 1, or 7, paragraph 3, of the Statute. Interestingly, the Čerkez Defence cited the famous cases of *Korematsu v. United States* and *Hirabayashi v. United States* where it was held that the internment of US nationals of Japanese origin during World War II in US territory, did not violate their constitutionally protected civil rights. The Defence averred that since these internments were enforced by the US Government against their own nationals on US territory – far from combat activity – the temporary internment of Bosnian Muslims in a war zone of ongoing combat operations could be considered *a fortiori* completely lawful on basic grounds of State security and public order in order to prevent espionage and sabotage.

In considering the arguments of the Parties, the Trial Chamber distinguished the legality of the confinement *ab initio* from the subsequent legality of confinement *in corso*, which depends on whether the detainee's human rights, such as the right not to be tortured, right to receive a fair trial, and other rights pertaining to the detention and the fair administration of criminal justice, were respected on an ongoing basis, bearing in mind that certain human rights could be lawfully suspended or derogated from in time of war on a temporary basis and under certain conditions.[40] Article 5 of the Fourth Geneva Convention provides that the Detaining

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38 Par. 271 of the Judgement.

39 Par. 275 of the Judgement.

40 See Article 4 of the International Covenant on Civil and Political Rights, adopted 16 December 1966; entered into force 23 March 1976; UNTS No. 14668, vol. 999 (1976) at 171.

Power can restrict the rights of individual protected persons where it definitely suspected him or her of engagement in "activities hostile to the security of the State". In such cases, the individual cannot not claim the rights and privileges otherwise extended to him or her by the Convention where this would be prejudicial to State security. As the Trial Chamber noted, Article 5 of Geneva Convention IV appears to recognize a very wide margin of discretion on the part of the Detaining Power on this issue. This margin of discretion is not unlimited however, and as the Čelebići Trial Chamber held in a passage cited by the Kordić and Čerkez Trial Chamber, the criteria defining activities prejudicial to State security have to be judged according to international rather than domestic law, in effect, bringing the matter within the competence of international tribunals to decide upon, rather than to designate the matter as one of exclusive national law and policy. Taking into account that Article 27, paragraph 4 of the Fourth Geneva Convention allows parties to an armed conflict to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war" the Trial Chamber underlined that Article 27, paragraphs 1, 2 and 3, still imposes an obligation upon the parties to respect the specific rights of protected persons to their honour, family rights, religious convictions and practices, and their manners and customs. As well, they must be treated humanely and protected against all acts of violence, threats, insults and public curiosity. Women are especially protected against attack on their honour, and from rape, enforced prostitution and indecent assault.

As regards internment, which involves the moving of peoples from their normal place of residence to a place of detention in another locale, together with other internees for particularly close supervision, the Fourth Geneva Convention stipulates that such action should only be undertaken where the State security of the Detaining Power made it absolutely necessary.[41]

The Trial Chamber then reviewed the details of the procedural safeguards in respect of civilians entitled to the status of protected persons under the Fourth Geneva Convention, noting in particular that, as the Čelebići Trial Chamber held, while the Geneva Conventions leaves a wide margin of discretion to the State to delimit the boundaries as to what activities constitute a threat to its security: a) measures of internment cannot be instituted on a collective basis, but have to be effected solely on a case-by-case basis; and b) quoting from the Čelebići Case Trial Judgement "An initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV."[42]

Considering the Čerkez Defence argument in regard to the Korematsu and Hirabayashi Cases, the Trial Chamber noted that these cases pre-dated the 1949 Geneva Conventions, and moreover, have become recognized officially in the 1980 finding of the Commission on Wartime Relocation and Internment of Civilians to reflect racial prejudice and war-time hysteria. The Trial Chamber therefore concluded that the relevance of these two cases has been overtaken by history and it reiterated that confinement of civilians during armed conflict is permissible in certain cases, but can become unlawful where the procedural safeguards of Articles 42 and 43 of Geneva Convention IV have been breached.

As for imprisonment, the Trial Chamber could not rely on earlier ICTY or ICTR jurisprudence in connection with crimes against humanity. Whereas the Prosecution equated imprisonment in Article 5, sub e, of the Statute with unlawful confinement under Article 2, the Kordić Defence contended that imprisonment could only qualify as a crime against humanity where the perpetrator had the: "specific intent to take part in the furtherance of a formal government policy or plan and with discriminatory intent."[43] The Čerkez Defence position did not differ from that of the Prosecution.

Noting that the ICTY and ICTR Statutes did not define 'imprisonment' as a crime against humanity, the Trial Chamber looked for guidance in the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind[44] which defined 'arbitrary imprisonment', and in the Rome Statute's provisions on crimes against humanity which covered imprisonment only where it violated fundamental rules

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41 See Article 42 of the Fourth Geneva Convention.

42 Par. 289 of the Judgement.

43 Par. 293 of the Judgement.

44 Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Drafting Committee on Second Reading at its 47th and 48th sessions; A/CN.4/L.522 of 31 May 1996.

of international law. This lead the Trial Chamber to concur with the Prosecution argument that imprisonment as a crime against humanity was the same thing as 'arbitrary imprisonment' or the deprivation of liberty of an individual without due process of law, as long as it formed part of a widespread or systematic attack directed against a civilian population. It followed from this approach that the Trial Chamber then had to determine: 1) whether the imprisonment conformed to the applicable international legal norms; and 2) whether the unlawful confinement was sufficiently connected to a widespread or systematic attack directed against a civilian population. In terms of the criteria to determine whether the imprisonment of civilians violated international law, the Trial Chamber applied Articles 42 and 43 of the Fourth Geneva Convention, rather than international human rights law pertaining to the administration of criminal justice in general. One wonders whether this approach was a little too narrow, given the fact that norms prohibiting crimes against humanity are now considered applicable in time of war and peace, and therefore arguably, the broader norms of international human rights law should be applied,[45] rather than the somewhat more limited standards of the Fourth Geneva Convention which apply only in armed conflict.

E. Taking of Hostages

The two accused were alleged to have taken Bosnian Muslim civilians as hostages, violating Articles 2 and 3 of the Statute. The Prosecution submitted that hostage-taking involved the detention of civilians for the purpose of securing some advantage from a party to the conflict, or from another person or group of persons, together with a threat to life, well-being or freedom of the detainees if the advantage was not secured. The Kordić Defence contended that an instance of detention could be considered a case of hostage-taking only: "where the accused lacks a reasonable basis for detaining the civilian hostages."[46] This requirement makes sense, otherwise hostage-taking would have to be understood as involving an instance of lawful detention, which would seem strange indeed. Further, the Defence added that to qualify as hostage-taking, the accused must have had the specific intent to extract a concession from the victim, and that this intention was a matter to be proved.

To decide on this issue, the Trial Chamber took note of the ICRC Commentary on Article 147 of the Fourth Geneva Convention which emphasized that hostage-taking, which qualified as a grave breach, had to be treated as a special offence because of the involvement of the threat against the detainee, and as the Defence argued, involved an unlawful detention only, rather than one that would otherwise be considered lawful. Does this mean that threatening a detainee who was placed in detention lawfully could turn the detention into an unlawful detention because of the breach of the victim's human rights? If this were the case, absent any other element that turned the confinement from lawful to unlawful, would we have to identify the threat itself as a human rights violation, perhaps as an act of mental torture, and if so, would this mean that the offence of hostage-taking can be said to have occurred only where: a) the detention was *ab initio* unlawful; or b) the detention was *ab initio* lawful but became unlawful because of the infliction of a threat amounting to an act of torture?

Following the definition of hostage-taking as adopted by the Trial Chamber in Blaškić which incorporated the element of persons unlawfully deprived of their liberty for the purpose of gaining an advantage, the Trial Chamber considered that the Prosecution must prove that at the time of detention, the accused tried to obtain a concession or gain an advantage, in effect, endorsing the argument of the Kordić Defence. Considered as a violation of the laws or customs of war in the context of Article 3 of the Statute (and common Article 3, paragraph 1, of the Geneva Conventions and Articles 75, paragraph 2, sub c, and 4, paragraph 2, sub c, of Protocols I and II respectively), the Trial Chamber assimilated the definition of 'hostage-taking' to that construed in connection with Article 2 of the Statute.

The question of unlawful attacks on civilians and civilian objects comes under the heading of 'violations of the laws or customs of war' in Article 3 of the Statute. Looking at the provisions of Article 3, we see that

[45] For example, the Standard Minimum Rules for the Treatment of Prisoners, the UN Convention against Torture, the International Covenant on Civil and Political Rights, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, and the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, which might be useful for the Trial Chamber as guidance to gauge the legality of confinement.

[46] Par. 308 of the Judgement.

it covers the classic Hague Convention prohibitions on the employment of poisonous weapons or weapons causing unnecessary suffering, wanton destruction of cities, towns or villages not justified by military necessity, attack or bombardment on undefended towns, villages, etc., wilful destruction or seizure of cultural property, and plunder of public of private property. None of these provisions relate specifically to unlawful attacks directly on civilians themselves. The Trial Chamber therefore had to import the Geneva Convention protection of civilians and objects as part of established customary law, as clarified and supplemented by Protocol I into Article 3 of the Statute under the rubric of 'laws or customs of war'. As the Trial Chamber observed, Article 52, paragraph 1, of Protocol I establishes that: "all objects which are not military objectives" are civilian objects, and military objects are objects that, on account of 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."[47]

F. Attacks and Property-Related Offences Not Justified by Military Necessity

As for "extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly" in Article 2, paragraph d, of the Statute, interestingly, the Defence argued that it was for the Prosecution to prove that the destruction of property was not justified by military necessity. Were the Trial Chamber to have accepted this part of the Defence argument, it would have meant that war-time destruction would be presumed to have been lawful and justified unless this could be proven to the contrary. Without this presumption, the Defence could conceivably have to justify each and every attack strictly according to the requirements of military necessity, and failing that, to be held liable for what could be presumed to constitute an attack on civilians or civilian objects wherever the damage was extensive. What is certain however, as the ICRC Commentary to Article 147 of Geneva Convention IV underlines, is that destruction of civilian hospitals, medical instalments and transportation, is absolutely prohibited and constitutes a grave breach. Less clear is the destruction of property in occupied territory which can be lawful where the destruction was 'absolutely necessary' for military purposes, because absolute necessity can be very difficult to establish in fact and also, what may appear absolutely necessary at the moment of military operations could prove ultimately to have been absolutely unnecessary in retrospect. Even less clear is the boundary between requirements of military necessity and unlawful destruction of property in enemy territory, which can be more difficult to ascertain than in occupied territory where the Occupying Power is supposed to exercise effective control. Accordingly, the Geneva Conventions place a higher standard of obligation on Occupying Powers, but it is Article 42 of Hague Convention IV which actually defines an 'occupied territory' (rather than the Geneva Conventions which remain silent) as territory that has actually been "placed under the authority of the hostile army" and Hague Convention IV establishes that the "occupation extends only to the territory where such authority has been established and can be exercised". In line with the Blaškić Trial Chamber Judgement, the Trial Chamber considered that extensive destruction of property constitutes a grave breach of the Geneva Conventions:

"(i) where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or

(ii) where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and

(iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction."[48]

However, this does not clarify the issue as to the evidentiary burden concerning 'requirements of military necessity'.

Kordić and Čerkez were also charged with having committed wanton destruction of cities, towns or villages, or devastation not justified by military necessity as per Article 3, sub b, of the Statute. Whereas the Prosecution contended that only 'occurrence of destruction or devastation of property' was sufficient to fulfil

[47] Par. 237 of the Judgement.

[48] Par. 341 of the Judgement.

the *actus reus* requirement, together with a lack of justification on grounds of military necessity, the Kordić Defence argued that there had to have been large-scale destruction involving whole areas that was not justified by military necessity. Also, in contrast to the Prosecution, the Defence argued that a nexus between the destruction and an armed conflict was insufficient, unless the accused had participated in that armed conflict. In holding that the crime of wanton destruction not justified by military necessity within the meaning of Article 3, sub b, required that: "(i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction,"[49] the Chamber did not pronounce itself as to whether it considered that the accused had to have participated in the armed conflict connected to the destruction, or whether the mere existence of an armed conflict connected to the destruction was sufficient.

Both accused were also charged with plunder of public or private property, and here too, the Kordić Defence sought to impose the burden on the Prosecution to establish not only that public or private property had been unlawfully or violently acquired in a wilful way and that there was a nexus between the unlawful appropriation of property and an armed conflict, but also that there had been no justification for the appropriation and that the accused had possessed the intent to deprive the owner permanently of its possession or use. In other words, the Defence sought to make room for the possibility that the appropriation was intended to have been temporary only and that the accused could have intended to return the property to its rightful owner. Moreover, the Defence argued that individual criminal responsibility could not arise unless the property taken had a certain monetary value, such as that it involved 'grave consequences for the victim'. Had the Defence insisted only that the property taken had to have had a certain minimum value, monetary or symbolic, without adding the 'grave consequences' requirement, this might possibly have met with the Trial Chamber's agreement, since the theft of a single penny seems obviously too inconsequential to qualify as plunder. Possibly, the Defence overstated its case by urging the Trial Chamber to enforce responsibility only where there were 'grave consequences for the victim' because if this argument were accepted, it would make the crime of plunder wholly dependent upon incidental factors rather than on the wrongfulness of the act in itself. Should the theft of a gold watch from a poor man be considered worse than the theft of a gold watch from a rich man?

In its decision, the Trial Chamber made clear that it considered plunder to encompass a wide range of unlawful appropriation of property, both as a matter of widespread or systematic theft and isolated acts of theft by an individual for private gain. This broad view of plunder set a low bar for the Prosecution, but at least the Trial Chamber's holding required that there had to have been 'sufficient monetary value' that involved 'grave consequences for the victim' as per the Čelebići Trial Judgement and Defence argument on this point.

Finally, the Trial Chamber reviewed the charge of destruction or wilful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science as per Article 3, sub b, of the Statute.

The Prosecution contended that such destruction or wilful damage in fact occurred, it was committed wilfully, the institutions in question were protected under international humanitarian law, and there was a nexus between these acts on the one hand, with an armed conflict and the responsibility of Kordić and Čerkez as per Article 7 of the Statute on the other hand. The Kordić Defence insisted that military necessity could be a justification, such that if the institutions destroyed or wilfully damaged had served a military purpose, this fact should exculpate the accused. In addition, the Defence argued that the accused had to have had the specific intent to destroy or damage particular religious institutions 'which constitute the cultural or spiritual heritage of peoples'[50] and not just that the accused had destroyed institutions he either did not know were of such cultural importance, or that he had accidentally caused the damage.

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49 Par. 346 of the Judgement.

50 Par. 356 of the Judgement.

V. The Application of Principles of Individual Criminal Responsibility

A. In General

After having decided on the definition, application and scope of the crimes allegedly committed by Kordić and Čerkez, the Trial Chamber moved on to the question of individual criminal responsibility under Articles 7, paragraph 1, and 7, paragraph 3, of the Statute, which provide for the responsibility of the superior for acts or omissions on the part of his or her subordinates.[51, 52] The formulation of Article 7, paragraph 3, is quite significant because, in employing the phrase 'does not relieve his superior of criminal responsibility', it presumes a high level of responsibility of commander over subordinates. Otherwise, Article 7, paragraph 3, could have been phrased along the lines that an act or omission by a subordinate that constituted a crime under the Statute, *could implicate* the superior where he or she knew or had reason to know etc. The construction of Article 7, paragraph 3, however, assumes that in fact commanders do exercise authority and control over their subordinates and therefore that they must be placed under a relatively high level of responsibility to prevent such acts or omissions from being committed by their subordinates. Moreover, commanders cannot escape liability as long as they actually knew (a subjective test), or 'had reason to know' (an objective test) of the acts committed or about to be committed.

The Trial Chamber observed that Article 7, paragraph 1, imposed responsibility upon individuals who were directly involved in "planning, preparation or execution of a crime" and that 'superior' in the context of Article 7, paragraph 1, extended also to civilians and political superiors, not just to military commanders. Article 7, paragraph 3, on the other hand, extends criminal responsibility over a superior who failed to prevent a crime as affirmed by the Èelebiæi Trial and Appeals Chambers Judgements, and in this sense, it addresses responsibility for indirect involvement in the crime in question, basically through an omission to act, rather than the positive commission of an act. In this connection, the Trial Chamber recalled Article 87 of Protocol I which requires military commanders "with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions" and the Protocol.

The Trial Chamber was also careful to point out that superior responsibility is not a form of strict liability in the sense that a superior is to be held responsible for *all* crimes under international law committed by his or her subordinates, because of the limiting condition that he or she "knew or had reason to know" of these crimes and yet did not take measures either to prevent them or to punish the perpetrators.

B. Article 7, paragraph 1, of the Statute

Returning to Article 7, paragraph 1, the Trial Chamber noted that individual responsibility for 'planning, assisting, participating, or aiding and abetting' in the commission of a crime, found support in customary international law, but it did not bother to locate the principle in the ancient trial of Peter von Hagenbach held in 1474 which found the accused guilty in his capacity as commander for having failed to prevent or punish violations of the laws and customs of war by his subordinates, its inclusion in the Nuremberg and Tokyo International Military Tribunal Charters and jurisprudence, or its enshrinement in paragraph IV of the Nuremberg Principles.[53]

Predictably, the difference between the Prosecution and the Defence as to how Article 7, paragraph 1, should be applied concerned the degree of involvement necessary to implicate the accused in the direct commission of the crime. The Defence contended that the accused had to have exhibited the specific intent to commit the

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[51] Par. 363 of the Judgement.

[52] Articles 7, paragraph 1, and 7, paragraph 3, of the Statute read:

"1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. (...)

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

[53] General Assembly resolution 95(1), adopted on 11 December 1946 on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.

crime, while the Prosecution argued for the application of a much lower threshold, namely, that the accused should be found guilty where the "accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct."[54] Here, the Trial Chamber opted for the Defence submission, probably considering that the Prosecution's overly broad criterion would result in 'guilt by association', rather than in genuine findings of criminal culpability according to basic standards of criminal justice. The Trial Chamber recalled the holding in the Tadić Appeals Chamber Judgement that Article 7, paragraph 1, covered 'first and foremost' the actual direct commission of a crime by the accused or an omission importing criminal responsibility where law so provided.

The Trial Chamber then considered that the elements of 'planning, instigating, ordering' under Article 7, paragraph 1, involve the *actus reus* of a crime committed by a person other than the accused to execute the accused's plan where the accused had the *mens rea* of the crime, or was 'aware of the substantial likelihood that the commission of the crime would be a consequence of carrying out the plan.'[55] The Kordić Defence, in contrast, viewed 'planning' as a form of 'aiding and abetting' that could apply to an accused only where a course of criminal conduct reached completion. The Kordić Defence also argued that a person could not be held responsible both for planning the commission of a crime *and* committing the crime, presumably because this would result in being prosecuted and punished twice for the same act – a violation of *ne bis in idem*.

The Prosecution argued that instigation of a crime under the Statute could take place where the accused 'provoked or induced' another person to commit a crime if there was a clear causal connection between the instigation and the actual commission of a crime. In terms of evidence, it would be sufficient for the Prosecution to prove that the conduct of the accused "strengthened the resolve of the direct perpetrator who already had the intention to commit a crime,"[56] coupled with the same 'awareness of substantial likelihood' *mens rea* requirement as for 'planning'. Defined in this way, the Prosecution's argument seems overly broad, since 'strengthening the resolve of the direct perpetrator' appears quite elastic and ambiguous.

Importantly, the Prosecution submitted that 'ordering' could implicate those of paramilitary forces or special units in addition to formal orders issued by regular military commanders, thereby seeking to close off the defence that a particular accused was not part of a formally constituted regular military command structure. Invoking the 'substantial likelihood' test of the Blaškić Trial Judgement, the Prosecution contended that it did not have to establish that a subordinate who actually executed an order had shared the *mens rea* of the accused. The Kordić Defence, on the other hand, urged the Trial Chamber to apply the more exacting requirements that: a) there existed a superior-subordinate relationship; b) the superior must have ordered a particular subordinate to commit the crime, rather than merely to have issued general orders on general topics; c) the order and commission of a specific crime were causally linked; and d) the superior "must have been aware of the constitutive elements of the crime ordered, and must have desired a crime to be committed by the subordinate".[57] In short, the Kordić Defence insisted that the superior had to possess 'the very same intent' as that required on the part of the subordinate.

The Trial Chamber, taking note also of the Trial Judgements in Tadić and Akayesu, concluded that an accused who did not directly commit a crime could not be held responsible for it unless he had possessed the intention to participate in the commission of the crime and his deliberate acts "contributed directly and substantially to the crime,"[58] and that, 'planning' would not implicate an accused unless it involved both the preparation *and* the execution phases of criminal conduct. As per the Blaškić Trial Judgement however, the existence of a plan could be proved circumstantially, effectively reducing the Prosecution's burden. The Trial Chamber also sided with the Prosecution's submission's that: ordering could occur outside a formal superior-subordinate relationship; no causal connection between instigation and crime had to be established; and that the commander's *mens rea* was the key element in establishing his or her responsibility, not that of the subordinate who had executed the order.

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54 Par. 375 of the Judgement.
55 Par. 377 of the Judgement.
56 Par. 380 of the Judgement.
57 Par. 384 of the Judgement.
58 Par. 385 of the Judgement.

As for 'aiding and abetting and participation in a common purpose or design', the Prosecution considered 'aiding' to be synonymous with 'assistance' and distinct from 'abetting' that related more to 'facilitation', such that Article 7, paragraph 1, imposed criminal responsibility upon the accused if *either* rather than *both together* were proved. The Prosecution also dissociated aiding and abetting from any requirement of a pre-existing plan, but that where there did exist a plan, 'aiding and abetting' should be construed to sweep in everyone who participated in or contributed to it either before or after its execution. Even mere presence could constitute aiding and abetting where it could be established that this had encouraged the commission of a crime, particularly where the accused held a position of authority that indicated acquiescence or approval in the criminal act. Here again, the Prosecution insisted that the *mens rea* of the aider or abettor did not have to coincide exactly with that of the direct perpetrator, only that the accused "knew that his conduct would substantially contribute to the commission by another person of the *actus reus* of a crime, or was aware of the substantial likelihood that this would be a probable consequence of his conduct."[59] The Kordić Defence sought to persuade the Trial Chamber that the accused could not be inculpated unless his assistance contributed 'directly and substantially' to the commission of the crime "in the sense that such crime most likely would not have occurred in the same way without the accused acting as he did,"[60] not to the point that the accused's alleged aiding and abetting was a *conditio sine qua non* to the commission of the crime, but that it must have at least made some difference in its commission. Moreover, the Kordić Defence contended that mere presence could only import responsibility upon the accused where he "made a direct and significant contribution to the actual crime."[61] Finally, the Kordić Defence urged the Trial Chamber to apply a specific intent requirement amounting to 'a conscious decision to participate' without which the accused could not be found criminally responsible.

Interestingly, the Prosecution also sought to introduce criminal responsibility upon the accused for having been a knowing participant in a common plan or design, regardless as to his personal non-involvement in specific criminal acts, on the ground that involvement at the planning stage of a crime should implicate the accused as a principal perpetrator. As such, he should bear responsibility for all criminal acts that flowed from the plan in which he participated. The Kordić Defence objected to the introduction of a 'common purpose doctrine' on the ground that it had no basis in the Statute and moreover, that it would serve no valid purpose. To rule on this point, the Trial Chamber followed the Appeals Chamber in Tadić, simply observing that participation in a common purpose or design did come within Article 7, paragraph 1, of the Statute and that the *mens rea* requirement to be applied depended on the kind of common design in question.

C. Superior Responsibility under Article 7, paragraph 3, of the Statute

On the issue of superior responsibility, the Trial Chamber considered the three main elements that the Prosecution had to establish namely:

"(1) the existence of a relationship of superiority and subordination between the accused and the perpetrator of the underlying offence;
(2) the mental element, or knowledge of the superior that his subordinate had committed or was about to commit the crime;
(3) the failure of the superior to prevent the commission of the crime or to punish the perpetrators."[62]

With regard to the first element, the Čelebići, Aleksovski, and certain other ICTY and ICTR Judgements, have established that criminal responsibility for acts of a subordinate covers not only persons in a position of formal command, but also those who exercise civilian authority – a point pressed by the Prosecution. In this connection, it is the actual degree of control exercised by a superior over his or her subordinates that determines the superior-subordinate relationship, rather than its formal or informal character. The Kordić Defence, on the other hand, tried to limit the coverage of responsibility only to a superior 'in an actual military chain of command' and to a civilian superior only to the extent that he or she exercised a degree of control over the subordinate as a *de facto* military commander. The Defence argued that politicians or other

[59] Par. 390 of the Judgement.
[60] Par. 391 of the Judgement.
[61] Par. 391 of the Judgement.
[62] Par. 401 of the Judgement.

civilian superiors without formal or informal military command authority typically exercise much less actual control over subordinates than do military commanders. Furthermore, the Kordić Defence contended that international criminal law jurisprudence did not warrant an extended application of the principle of superior responsibility to inculpate civilians not in possession of military command authority.

The Trial Chamber recalled the Čelebići Appeals Chamber *dicta* that defined a commander or superior as a person "who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed."[63] Furthermore, the Trial Chamber took notice of Article 87, paragraph 1, of Protocol I which imposes the positive duty upon commanders to supervise "persons under their control" in addition to subordinates under their command. Not only does Article 87 extend the superior-subordinate relationship beyond formal command hierarchies, but also over a commander's obligation to supervise the population under his or her control in occupied territory.[64]

On the other hand, the Trial Chamber also noted the Čelebići Trial Chamber's caution that the degree of effective control of a commander over subordinates cannot be one of mere 'substantial influence' or something less, because the key element is the capacity to prevent and punish crimes committed by subordinates. The application of a lower standard of effective control would risk imposing liability upon a commander despite the fact that he or she neither committed the crime nor could have done much to prevent or punish the subordinate from committing it. The Trial Chamber summarized its position on this point, stating that "only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility."[65] In terms of indicators establishing the degree and character of superior authority, the Trial Chamber considered that the formal position of authority was revealed by formal grant of authority or appointment. However, with regard to both *de jure* and *de facto* authority, whether military or civilian, the Prosecution had to establish that actual authority had existed in fact. Actual authority may be signalled by the power to issue orders as well as whether these orders were actually followed, and the accused's position within the institutional hierarchy in question. Also relevant will be the level of the accused's public profile, his or her participation in negotiations, and interaction with subordinates and outside parties, such as international peacekeepers and humanitarian personnel.

As regard *mens rea* relating to superior responsibility, Article 7, paragraph 3, distinguishes between two possibilities: where the superior either had actual knowledge that subordinates were committing or were about to commit a crime; and where the superior 'had reason to know' that the subordinates were committing or were about to commit a crime. The first possibility can be established directly or circumstantially. The second possibility is less straightforward. Does a superior have a legal obligation to inform himself or herself of the activities of subordinates to the point that he or she could be found guilty for not acquiring such information? The Prosecution contended that 'had reason to know' basically obtains where the superior possessed some information that signalled that an investigation was necessary to determine whether crimes were being or were about to be committed, and that failure to further investigate would import criminal responsibility upon the superior. Secondly, the Prosecution submitted that even where a military commander did not have any information that put him or her on notice, he or she could still be held criminally responsible for serious dereliction of duty. The Prosecution drew support from Article 28 of the Rome Statute of the ICC which it said codified the 'had reason to know' standard. In contrast, the Kordić Defence argued that 'had reason to know' meant actual information to put the commander on notice. The Defence contended that a commander could not be held criminally responsible for the actions of his or her subordinates from mere failure to inquire, rejecting the Prosecution's lower 'should have known' standard for the commander, which perhaps would approximate negligence.

The Trial Chamber observed that the Čelebići Appeals Chamber rejected a 'should have known' standard for commanders so that a commander could not be held criminally responsible only for failure to enquire

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[63] Par. 405 of the Judgement, citing par. 192 of ICTY, Judgement, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, A. Ch., 20 February 2001, Klip/Sluiter ALC-V-369.

[64] See further Commentary to Protocol I additional to the four Geneva Conventions of 12 August 1949.

[65] Par. 416 of the Judgement.

further into possible crimes by subordinates where he or she did not have sufficient information to satisfy the 'had reason to know' standard. However, once a commander receives sufficient information as to place himself or herself on notice of possible crimes being committed, or about to be committed, by his or her subordinates, the commander is then under a legal obligation to enquire into the situation, and failure to do so, would constitute serious dereliction of duty and import criminal responsibility. The kind of information that would require the superior to launch further enquiry would be the "level of training, or the character traits or habits of the subordinates.'[66] As for failure to take necessary and reasonable measures to prevent or punish crimes by subordinates, the Trial Chamber considered that, following *dicta* in the Čelebići and Blaškić Trial Chamber Judgements, a commander had to avail himself or herself of every means possible to do so, which depended upon the circumstances surrounding the facts in each case.

VI. Self-Defence as a Defence

Despite the fact that the Statute does not provide for self-defence as a defence, the Trial Chamber entertained the Kordić Defence that Kordić could not have been criminally responsible for acts done as part of Bosnian Croat effort to defend themselves against aggression from other ethnic groups in Central Bosnia, particularly as defences form part of general international criminal law principles. Relying on Article 31, paragraph 1, sub c, of the Rome Statute for guidance, the Trial Chamber held that an act of self-defence was one carried out in response to an imminent and unlawful use of force against a protected person or property in a manner proportional to the degree of danger posed by such use of force.

VII. The Issues of Cumulative Charges and Sentencing

As the Trial Chamber observed in its concluding part of its Judgement, ICTY practice has allowed charges to be brought cumulatively in the sense that a particular act which constitutes a violation of more than one provision of the Statute can form the basis for more than one charge. For example, taking civilians as hostages could be charged under both Articles 2 and 3.[67] Here, the Trial Chamber followed the Čelebići Appeals Chamber holding that: "Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."[68]

In the Čelebići Case, the Appeals Chamber opined that Article 2 of the Statute was materially distinct on account of its being more specific than Article 3 of the Statute which incorporated Common Article 3 of the Geneva Conventions as part of the 'laws or customs of war'. The Čelebići Appeals Chamber also considered 'wilful killing' under Article 2 of the Statute to be distinct from 'murder' under Article 3 of the Statute (importing the prohibitions in Common Article 3) insofar as Article 2 required the victim to have been a 'protected person' under the Geneva Conventions[69] and was therefore designed more specifically to apply to situations of international armed conflict. In such cases, 'wilful killing' under Article 2 should be preferred over 'murder' under Article 3 of the Statute for convicting the accused. Similarly, the Čelebići Appeals Chamber preferred to rely on the application of Article 2 to convict the accused for 'wilfully causing great suffering or serious injury to body or health' rather than on the Article 3 provision prohibiting 'cruel treatment', and 'inhumane treatment' (Article 2) rather than 'cruel treatment' (Article 3) because of the 'protected person' requirement.

Essentially, the ICTY doctrinal position is that as long as separate charges were not exactly the same in terms of material legal elements, the accused can be charged and convicted separately and cumulatively for the same act, but the Trial Chamber should prefer a conviction on the Statute provision more specifically

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[66] Par. 437 of the Judgement.

[67] Par. 810 of the Judgement.

[68] Par. 814 of the Judgement, citing ICTY, Judgement, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, A. Ch., 20 February 2001, Klip/Sluiter ALC-V-369, par. 412.

[69] Par. 817 of the Judgement.

applicable to the crime, where all elements are met. Applying these criteria, the Trial Chamber held that where the Prosecution has charged the accused with 'wilful killing' (Article 2) and 'murder' (Article 3) and 'murder' (Article 5), and all elements of the 'wilful killing' have been proved under Article 2, then the accused cannot be convicted under Article 3, but since Articles 2 and 5 differ from each other as regards their material legal elements, the accused possibly can be convicted under both Articles 2 and 5 for the same act.

Similarly, the Trial Chamber held that, with regard to cumulative charges concerning: 'wilfully causing great suffering and inhuman treatment' (Article 2), 'violence to life and persons' (Article 3), and 'inhumane acts' (Article 5), a conviction under Article 2 should be preferred in any case where the acts charged did not cause the death of the victim. The Trial Chamber took the same position as regards: 'inhuman treatment of detainees' (Article 2) versus 'cruel treatment of detainees' (Article 3); 'inhuman treatment' concerning the use of human shields (Article 2) versus 'cruel treatment' concerning the use of human shields (Article 3); as well as taking of civilians as hostages (Article 2) versus taking of hostages (Article 3). However, between unlawful confinement (Article 2) and imprisonment (Article 5), the Trial Chamber noted materially distinct legal elements and therefore found that it could enter convictions on both Articles 2 and 5.

In sentencing the accused, the Trial Chamber noted that the ethnic cleansing of Bosnian Muslims from the Lašva Valley led to savage, ruthless attacks that claimed hundreds of lives and displaced thousands. The Trial Chamber held that the fact that Kordić was a politician was not a mitigating factor as to punishment, but rather an aggravating one, and that he had "played his part as surely as the men who fired the guns". The Trial Chamber sentenced him to 25 years' imprisonment. As for Čerkez, the Trial Chamber found that his troops had not been involved in the Ahmići Massacre, but that he played an aggravating role in the Lašva Valley persecution campaign as commander. The Trial Chamber sentenced him to 15 years' imprisonment.

VIII. Concluding Remarks

Because the Kordić and Čerkez Trial Chamber Judgement concerns two accused of relatively high rank and it builds upon the consolidated doctrine of the ICTY and ICTR as well as treats a wide range of crimes and important principles of superior responsibility, the Judgement makes worthwhile reading for students, practitioners and academics concerned with international criminal law adjudication.

For the most part, the Kordić and Čerkez Trial Chamber Judgement succeeds in following established ICTY jurisprudence closely by taking a systematic approach to the content and application of each crime alleged in the Indictment. Despite the substantial degree of normative overlap among Articles 2, 3 and 5 of the Statute, and the great potential for confusion among them, the Trial Chamber Judgement manages to lend considerable coherence to the interpretation and application of the Statute, although certain areas of ambiguity inevitably remain unclarified.

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