(c) Commentary

The *Čelebići Case*: A Comment on the Main Legal Issues in the ICTY's Trial Chamber Judgment

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Abstract: The *Čelebići Trial Judgment*, rendered by the International Criminal Tribunal fo the Former Yugoslavia – the first ever to involve the joint trial of more than one accused - considers numerous important issues, from the method of interpreting international crimina law, the meaning and interrelationship between Articles 2 and 3 of the Statute, the characte of the armed conflict and the status of "protected persons", to many difficult questions sur rounding the heinous acts perpetrated in *Čelebići Camp*. This comment analyzes the reason ing of the Trial Chambers to critically evaluate the significance of this fascinating case for th future development of international criminal law doctrine.

1. INTRODUCTION

The purpose of this case comment is to highlight some of the more interestin aspects of the *Čelebići Judgment*,[1] handed down by the Trial Chamber of th International Criminal Tribunal for the Former Yugoslavia (ICTY), not only th result reached, but also how the Trial Chamber got there, as well as the effec the Judgment might have on the progressive development of international crimi nal law.

The Judgment is only the second rendered by the ICTY and the first to hav involved more than one accused charged and tried jointly. The trial itself, whic began on 10 March 1997, took 19 months before Judgment was rendered, an demonstrates the extensive labour and resources required to prosecute individu

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1. The Čelebići Trial Judgment is styled Prosecutor of the International Criminal Tribunal of the Form Yugoslavia *v.* Zejnil Delalić, Zdravko Mucić, also known as "Pavo", Hazim Delić, Esad Landžo al known as "Zenga", Trial Chamber before Judges Karibi-Whyte, Odio Benito, Saood Jan, Case N IT-96-21-T of 16 November 1998, hereinafter referred to as the "Čelebići Trial Judgment".

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als for crimes under international law. It involved the hearing of 122 witnesses, the admission of some 1,500 exhibits into evidence and the generation of around 16,000 pages of documents in English alone. Simultaneous interpretation was made available throughout the trial in English, French and Bosnian / Croatian / Serbian.

The *Čelebići Trial Judgment* explores general principles of interpretation, the requirements of the application of Articles 2 and 3 of the Statute, the question of the character of the conflict and status of "protected persons" under Article 2, aspects of individual criminal responsibility, principles and elements of command or superior responsibility as well as the elements of the crimes Articles 2 and 3 prohibit.

In order to uncover these and other interesting legal issues, it is valuable to review the substance of the Indictment, the identity and alleged role in Čelebići camp of the accused, the charges, the main issues arising from applicable law, a number of factual and legal findings, and the sentencing, before stepping back a little to consider the significance of the *Čelebići Trial Judgment* in terms of the development of international criminal law.

2. WHAT DID THE PROSECUTION CHARGE?

2.1. Background

Čelebići camp is found near Čelebići village, in Konjic municipality, which includes also a number of other villages. The Indictment notes that in the 1991 census, the municipality had around 45,000 persons, falling roughly into 55% Muslim, 26% Croatian, and 15% Serbian. According to the Indictment, around May 1992, Bosnian Muslim and Bosnian Croat forces took control of predominately Serb villages in the municipality, forcibly expelled Bosnian Serb residents from their homes and detained them in camps, including Čelebići camp, where many detainees allegedly were "killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment"[2] from around May to October 1992. Following their detention in Čelebići camp, asserts the Indictment, most detainees were then moved to other detention camps for periods lasting up to 28 months.

2.2. Who were the accused?

The Indictment alleges that Delalić, born 25 March 1948, coordinated activities of the Bosnian Muslim and Bosnian Croat forces in the Konjic area from April to September 1992, and acted as commander of the First Tactical Group of the Bosnian Muslim forces from June to November 1992. Further, it is alleged that Delalić's responsibilities included authority over the Čelebići prison camp and its personnel. Mucić, born 31 August 1955, is alleged to have acted also as a commander over Čelebići camp from May to November 1992. Delić, born 13 May 1964, is alleged to have acted as deputy commander of Čelebići camp from May to November 1992, and once Mucić left Čelebići in November 1992, to have assumed responsibilities as commander until the camp was closed around December 1992. The fourth accused – Landžo, born 7 March 1973 – was a guard at Čelebići camp from around May to December 1992.

The first three accused (Delalić, Mucić and Delić), were alleged to have held positions of superior authority over all camp guards as well as over anyone else who entered the camp and may have committed violations against detainees. The Indictment alleges they "knew or had reason to know that their subordinates were mistreating detainees, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators". They were therefore alleged to have incurred responsibility under Article 7(3) of the Tribunal's Statute, which provides that:

> 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.

On 18 March 1996, Delalić and Mucić were provisionally arrested following two separate requests from the ICTY Prosecutor to Germany and Austria pursuant to Rule 40 of the Rules of Procedure and Evidence. Following the confirmation of the Indictment by Judge Claude Jorda on 21 March 1996, warrants for the arrest of Delić and Landžo were sent to the authorities of Bosnia and Herzegovina. Also transmitted were warrants for the arrest of Delalić and Mucić and orders for their surrender from Germany and Austria respectively. Mucić was transferred from Austria to the UN Detention Unit at The Hague on 9 April 1996, Delalić from Germany on 8 May 1996. Delić, Mucić and Landžo were surrendered to the custody of the Tribunal by the Government of Bosnia and Herzegovina on 13 June 1996.

2.3. General allegations

The Indictment, issued on 19 March 1996 by Richard Goldstone, then Prosecutor of the ICTY, charges Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, with responsibility for having committed grave breaches of the 1949 Geneva Conventions, and violations of the laws and customs of war.

2. *See* The Indictment (Annex B to the Čelebići Trial Judgement), at para. 2.

Landžo, the camp guard, is accused of responsibility "also or alternatively"[3] on account of his direct participation in acts prohibited by the Statute, as per Article 7(1) 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.[4]

The Indictment alleges that there existed, at all material times, a state of international armed conflict and partial occupation in Bosnia and Herzegovina, that all acts or omissions forming the subject of the Indictment constituted grave breaches of the Geneva Conventions, 1949, and that the accused were obliged to abide by the laws and customs governing the conduct of war, including Article 3 common to the four Geneva Conventions. The Indictment further contends that all of the victims were detainees at Čelebići camp and that they qualified as "protected persons" within the meaning of the Geneva Conventions.

2.4. What were the specifics of the charges?

It is always important not to lose sight of the kinds of acts actually committed as well as the circumstances in which they were perpetrated as a reminder of the immense suffering of victims in such situations, and therefore, of the urgent necessity to see international criminal law implemented fairly, effectively and universally.

The Prosecution charges the four accused with 49 counts, which the Indictment organizes according to the particular incidents in question.

Counts 1 to 12 allege individual criminal responsibility for a grave breach of Article 2(a) of the Statute (wilful killing) and for murder as a violation of the laws and customs of war – a breach of Article 3 of the Statute and Article 3(1)(a) of the Geneva Conventions. In particular, Counts 1 and 2 charge that Delić and Landžo killed a detainee named Gotovac, aged between 60 and 70 years old, in June 1992. Counts 3 and 4 implicate Delić in the beating to death of another man called Milosevic. Counts 5 and 6 charge Delić and Landžo with the killing of a man named Jovanovic by severe beating and denial of medical treatment in July 1992. Counts 7 and 8 charge Landžo also beat to death one Samoukovic, who was around 60 years old, with a wooden plank in July 1992. Counts 9 and 10 charge Landžo with the beating of Miljanic, another 60 to 70 year old man, to death with a baseball bat. Counts 11 and 12 allege that a group that included Delić and Landžo tortured and killed one Susic in August 1992.

Counts 13 and 14 charge that Delalić, Delić and Mucić "knew or had reason to know that their subordinates were about to commit" these eight murders, in addition to another six murders which form the subject of Counts 1 to 12 and that they "failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators".

Counts 15 to 17 charge Delić and Landžo, by their acts and omissions, with responsibility for the torture of Kuljanin, perpetrated from around 25 May 1992 to early September 1992.

Counts 18 to 20 charge Delić with the torture and rape of Ćećez and to repeated incidents of forcible sexual intercourse from around 27 May to early August 1992, prohibited under Article 2(b) of the Statute on torture and Article 3(1)(a) of the Geneva Conventions on torture and cruel treatment. Counts 21 to 23 charge Delić with the torture and rape of "Witness A" every few days from 15 June to early August 1992 under the Statute's provisions on torture. Counts 24 to 26 charge that Delić and Landžo tortured Babić around the middle of July 1992. Counts 30 to 32 charge Landžo with the torture and beating of Dordić in June 1992, with a baseball bat, forcing him to do push-ups while being beaten, and with having placed hot metal pincers on his tongue and in his ear.

Counts 33 to 35 charge Delalić, Mucić and Delić with superior responsibility for acts of torture in Čelebići camp, "including placing Milovan Kuljanin in a manhole for several days without food or water" and for having "failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators". In addition, Delić is charged with direct participation in these crimes.

Counts 36 and 37 charge Landžo with "wilfully causing great suffering or serious injury" (a grave breach under Article 2(c) of the Statute), and with "cruel treatment" (a violation of the laws and customs of war punishable under Article 3 (1)(a) of the Geneva Conventions as incorporated in Article 3 of the Statute). In the particular incident in question, Landžo was alleged to have tied Draganić to a roof beam, beat him with a baseball bat, poured gasoline on his trousers and then set them on fire, burning his legs. Counts 38 and 39 charge Delalić, Mucić and Delić, with having known or having had reason to know that subordinates were about to severely beat detainees or to place a burning fuse cord around the genitals of detainees, and with failing to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators.

Counts 40 and 41, ultimately withdrawn by the Prosecution, charged Delić with direct participation and responsibility over the actions of his subordinates for causing great suffering or serious injury in connection with the beating of Bozić for around 30 minutes on or around 1 December 1992.

Counts 42 and 43 charge Delić with inhuman treatment under Article 2(b) of the Statute and cruel treatment under Article 3 of the Statute, corresponding to

3. The Prosecution was careful to employ the phrase "also or alternatively" in order to avoid any implication that Landžo's responsibility is necessarily contingent or dependent upon a finding of guilt of any one of the three commander-level accused.
4. Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to the Report of the Secretary-General; UN Doc. S/25704 of 3 May 1993; *approved* by Security Council Resolution 827, *adopted* on 25 May 1993, hereinafter referred to as "The Statute".

Article 3(1)(a) of the Geneva Conventions with respect to the use of an electrical device to inflict pain on many detainees.

Counts 44 and 45 connect the responsibility of Delalić, Mucić and Delić, in their capacities as Čelebići camp superiors, with inhuman treatment and cruel treatment in respect of Counts 42 and 43, and incidents of forcing persons to commit *fellatio* with each other and forcing father and son to slap each other repeatedly.

Counts 46 and 47 charge all four accused with having subjected Čelebići camp detainees between May and October 1992 "to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as sleeping and toilet facilities", causing the detainees "severe psychological and physical trauma".

Count 48 charges Delalić, Mucić and Delić, with direct participation and command responsibility for the unlawful confinement of civilians pursuant to Article 2(g) of the Statute.

Count 49 charges Mucić and Delić with direct participation and responsibility over their subordinates under Article 3(e) for the plunder of money, watches and other valuables, from Čelebići camp detainees.

3. What Were the Main Legal Issues Concerning Applicable Law?

The Judgment's discussion on applicable law begins with general principles of interpretation, moves to the general requirements of Articles 2 and 3 of the Statute and the question of the status of the victims as "protected persons" under Article 2, then explores principles of individual criminal responsibility and command responsibility, before analyzing the elements of the offences.

3.1. General principles of interpretation

The Trial Chamber notes that interpretation:

> [...] in the context of statutes, including the Statute of the Tribunal, may be explained both in a broad and in a narrow sense. In its broad sense, it involves the creative activities of the judge in extending, restricting or modifying a rule of law contained in its statutory form. In its narrow sense, it could be taken to denote the role of a judge in explaining the meaning of words or phrases used in a statute.[5]

The Trial Chamber commented that the Statute and Rules form a fusion and synthesis of two dominant legal traditions – common law and civil law – and that it was therefore necessary "and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions."[6] The Trial Chamber then referred to some English common law cases and a few of the European Court of Human Rights to explain the application of 'the mischief rule'. It then underlined that, in interpreting the provisions of the Statute and Rules, it must take into account "the objects of the Statute and the social and political considerations which gave rise to its creation".[7]

The Trial Chamber's acknowledgement that statutory interpretation may involve "the creative activities of the judge in extending, restricting or modifying a rule of law contained in its statutory form" is rather striking in its judicial candour and intellectual honesty. Words must be understood within their context and according to the purpose behind them – an approach the Trial Chamber identifies as the 'teleological' approach, more familiar in civil, than common law. The Trial Chamber's approach falls in line with the general trend in jurisprudential thought away from the strict positivist view that the judge is limited to uncovering only the objective meaning of words and phrases, as if this could be performed as a purely analytical exercise.[8] To say the least, statutory interpretation inspired by legal positivism has always erred on the conservative side and, given the large gaps in the normative coverage of international criminal law, one could even imagine *non liquet* in extreme cases.

However, one wonders whether the Trial Chamber's acknowledgement of the possibility of its "extending, restricting or modifying a rule of law contained in its statutory form" risks lending the impression that the Trial Chamber might be too eager to construe the words of the 'legislator' – the UN Security Council in this case – beyond the intended purpose and scope of the Statute.

In the section entitled "General Aids to Interpretation", the Trial Chamber did not seem to consider it important even to mention the Vienna Convention on

5. Čelebići Trial Judgment, at para. 158.

6. *Id.*, at para. 159.
7. *Id.*, at para. 170.
8. The classic formula of legal positivism is found in Austin's statement that: "[...] Jurisprudence is the science of what is essential to law, combined with the science of what ought to be". *See* J. Austin, The Uses of the Study of Jurisprudence (1998). Probably the most famous expression of its radical companion – logical positivism – is to be found in A.J. Ayer, Language, Truth and Logic (1946). However, the view that words denote things (which implies in legal interpretation that the role of the Judge is to analyze and describe the essential elements of law) was most cogently rejected by Gilbert Ryle, Glanville Williams and Ludwig von Wittgenstein who showed that the meanings of words must be understood by reference to their use, context and purpose, rather than by descriptive analysis. *See* G. Ryle, *The Theory of Meaning*, *in* G. Ryle *et al.* (Eds.), Studies in the Philosophy of Thought and Action: British Academy (1968); A. Flew (Ed.), Logic and Language: Essays by Gilbert Ryle and others (1963); and L. von Wittgenstein, Philosophical Investigations, G.E.M. Anscombe (1967). Equally, the American realist movement, expressed in the thought of William James, John Dewey and Charles Sanders Pierce, and Scandinavian realism propounded by such thinkers as Axel Hägerström, K. Olivecrona, A. V. Lundstedt and A. Ross, or the proponents of sociological jurisprudence, such as Roscoe Pound, Von Jhering, J. Stone and Roberto Unger, have all demonstrated the perils of adopting the extremely formal, narrow and legalistic approach of positivism to interpretation.

the Law of Treaties.[9] True, lawyers steeped in either one of the traditions of common law or civil law, molded the Statutes and Rules of the two International Criminal Tribunals. Yet, these are international instruments in birth and character, established by the United Nations on the authority of Chapter VII of its constituent instrument – the UN Charter. The Tribunals were established as subsidiary organs of the United Nations Security Council,[10] rather than as products of joint municipal military jurisdiction, such as the International Military Tribunals at Nuremberg and Tokyo.[11] Although the Statutes of the International Criminal Tribunals are not treaties, surely the guidelines on interpretation offered in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969, remain far more pertinent to interpretation of the Statute, than the *dicta* in cases to which the Trial Chamber refers. The guidelines of the Vienna Convention are universally recognized to have been carefully drafted to reflect international customary norms on treaty interpretation in a comprehensive manner. It must therefore be wondered why the Trial Chamber paid scant attention to the rules of treaty interpretation in general international law when explaining its own method of statutory interpretation.

The Trial Chamber referred to the Vienna Convention only in passing in a section of the Judgment concerning diminished responsibility:

> It is well settled that an interpretation of the Articles of the Statute and provisions of the Rules should begin with resort to the general principles of interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties.[12]

It is not clear how much this weak and somewhat belated endorsement of the Vienna Convention's importance as a guide for interpretation contrasts with the Trial Chamber's focus on 'social and political considerations' rather than on the Vienna Convention's counsel that interpretation shall be carried out "in good faith in accordance with the ordinary meaning to be given to the terms [...] in their context and in the light of its object and purpose". Indeed, it remains unclear what kinds of "social and political considerations" the Trial Chamber might have had in mind.

From a purely methodological point of view, this inconsistency, and the reference to 'social and political considerations' take us away from the standard rules of interpretation in general international law and put unnecessary distance between the Tribunal's decisions and the rich source of guidance on interpreta-

9. 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969), signed in Vienna 23 May 1969, entered into force 27 January 1980.
10. Art. 29 of the Charter of the United Nations provides that: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."
11. *See* L.S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation 281-284 (1997).
12. Čelebići Trial Judgment, at para. 1161, citing Prosecutor *v.* Erdemović, Separate Case No. IT-96-22-A, (Appeal Chamber), 7 October 1997, paras. 3-5, among other cases.

tion offered by the jurisprudence of the International Court of Justice and its predecessor, the Permanent Court of International Justice. The departure of the Trial Chamber from the language of the Vienna Convention thus introduces ambiguity in international criminal adjudication by reckoning that "social and political considerations" count as legitimate influences upon the mind of the Judge, but without explaining *what kinds* of social and political considerations might be relevant, and the weight if any, they are to be accorded in deciding upon the guilt or innocence of the accused.

3.2. General requirements for the application of Articles 2 and 3 of the Statute

Noting that the application of international humanitarian law requires the existence of an armed conflict, the Trial Chamber proceeded to follow the *dicta* of the Appeals Chamber in its "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", in *The Prosecutor* v. *Dusko Tadić* that:

> [...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State [...][13]

and that:

> [...] International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[14]

On the basis of its review of the military and political situations in the States of the former Yugoslavia up to 1992, and evidence demonstrating that Konjic municipality was the scene of significant armed violence in 1992, the Trial Chamber concluded that the level of hostilities there qualified as an "armed conflict" at the time the crimes outlined in the Indictment were alleged to have been committed, leaving for later the question as to whether the conflict was international or non-international in character.

To distinguish the acts alleged in the Indictment from ordinary criminal activity, the Trial Chamber rightly reverted once again to the Appeals Chamber jurisdiction decision in the *Tadić case* that "it is sufficient that the alleged crimes

13 The Prosecutor v. Dusko Tadić, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-D, 2 October 1995, at para. 70, hereinafter referred to as "Tadić Appeal Decision on Jurisdiction".
14. *Id.*

were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."[15]

Any stricter criterion would saddle the Prosecution with the burden to prove the conduct of actual hostilities on the day or moment the crimes in question were committed, which would be unreasonable and probably even irrelevant.

3.3. Character of the conflict and status of the victims as "Protected Persons" under Article 2

Concerning the application of Article 2 of the Statute pertaining to grave breaches of the Geneva Conventions,[16] the Trial Chamber observed that both the Prosecution and the Defence were in agreement that Article 2 would not apply unless the crimes alleged were committed in the context of an international armed conflict and that the alleged victims were "protected persons" under the Geneva Conventions.[17]

On this point, the Trial Chamber followed the Appeal Chamber reasoning in the *Tadić Jurisdiction Decision* that the grave breaches provisions of the Geneva Conventions apply only to situations of international armed conflict, and not to non-international armed conflicts,[18] although the Trial Chamber indicated its willingness to entertain the more progressive argument on this issue expressed by Judge Abi-Saab in his Dissenting Opinion.[19]

15. *Id.*
16. Art. 2, entitled "Grave breaches of the Geneva Conventions of 1949" reads: "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages."
17. Čelebići Trial Judgment, at para. 201.
18. In the Tadić Appeal Decision on Jurisdiction, at para. 80, the Majority held that: "The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system."
19. Interestingly, the Statute of the International Criminal Court, adopted in Rome in a non-recorded vote, 120 in favour, 7 against and 21 abstaining, on 17 July 1998, (*see* UN Doc. A/CONF.183/9), defines 'war crimes' in Art. 8 as certain acts that may be committed in international or non-international armed conflict, but maintains grave breaches of the Geneva Conventions, 1949, and serious violations of the laws and customs of war as categories of crimes that may be committed only in international armed conflict, leaving "serious violations of Article 3 common to the four Geneva Conventions, 1949", and "other serious violations of the laws and customs applicable in non-international armed conflict" as applicable to situations of non-international armed conflict. *See further* L.S. Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10)*, 6 European Journal of Crime, Criminal Law and Criminal Justice 377-399, at 392-398 (1998).

The Defence argued that the conflict surrounding Čelebići camp was non-international in character, and therefore, the alleged victims could not be considered to have been "protected persons" within the meaning of the Geneva Conventions or Article 2 of the Statute.

The Prosecution, on the other hand, stressed that the conflict in Konjic could not be viewed separately from the general conflagration going on in Bosnia and Herzegovina at the time, and that as long as there existed an international armed conflict in the area:

> [...] it is irrelevant whether or not the [Yugoslav People's Army or the Army of the Federal Republic of Yugoslavia] were present in the Konjic municipality itself, or whether there were actual combat activities there, during the entire time-period relevant to the Indictment.[20]

Moreover, the Prosecution urged the Trial Chamber to adopt not the criterion of 'effective control' to determine a relationship of agency between the military High Command and the individual persons that committed the crimes in question, but rather a standard requiring the Prosecution only to show they were demonstrably linked.

Basing itself on the Commentary to the Fourth Geneva Convention, the Trial Chamber noted that Article 6 of the Fourth Geneva Convention on the protection of civilians in time of war provides that "it shall apply from the outset of any conflict or occupation mentioned in Article 2" and "shall cease on the general close of military operations"[21] and that "Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."[22] Similarly, Article 5 of the Third Geneva Convention on the treatment of prisoners of war (POWs) extends protection beyond the general close of military operations in any case of doubt.[23] Thus, the Trial Chamber correctly pointed out that "the issue of whether the conflict was international in nature is quite separate from that of whether the indi-

20. Čelebići Trial Judgment, at para. 207.
21. *See* Art. 6 of 1949 Geneva Convention IV (Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950)).
22. *Id.*
23. Art. 5 of 1949 Geneva Convention III (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950)) reads: "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

vidual victims of the alleged criminal acts were protected persons" although the two questions are closely related.

In any event, the Trial Chamber held that it had "no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature" without indicating whether it considered Article 2 of the Statute applied only to international armed conflicts or to both international and non-international armed conflicts.[24]

The Geneva Conventions were designed not to overlap with each other as the Trial Chamber notes,[25] and thus, persons falling within the Third Geneva Convention definition of POWs cannot be considered at the same time "civilians" within the meaning of the Fourth Geneva Convention and vice-versa. The same goes generally for other categories of protected persons. The Defence sought to benefit from the non-overlapping design of the Conventions to argue that the detainees in Čelebići camp fell between the cracks in the Geneva Conventions protection system. Were this argument to find favour with the Trial Chamber, it would be only one logical step to the conclusion that, if the Čelebići camp detainees were not "protected persons", then the accused would not have committed a breach of the Geneva Conventions, and perhaps no crime at all under the Statute. Indeed, the Defence insisted that the definition of "prisoner of war" in the Third Geneva Convention is a strict one and that the Čelebići camp detainees matched neither the definition of POWs nor that of "protected persons" clearly set out in the Fourth Geneva Convention.

The Prosecution countered that it was immaterial whether it was the Third or Fourth Geneva Convention that applied to the particular Čelebići camp detainee victimized, simply because there are no gaps between or among the Geneva Conventions in the protection they together offer, except as regards the charge of unlawful confinement of civilians, which obviously depends upon the application only of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The question of nationality pops up as a related issue to the interpretation of 'protected persons' because the first paragraph of Article 4 of the Fourth Geneva Convention provides that:

24. Čelebići Trial Judgment, at para. 234-235.
25. There seems to be a serious editing mistake in paras. 236-238 of the Judgment, which confuses the language in paragraph 4 of Article 4 of the Fourth Geneva Convention as though it were the second paragraph of Article 4, making it appear that the third paragraph of Article 4 of the Fourth Geneva Convention are the words of the Trial Chamber's Judges. *Compare* paras. 236-237, Čelebići Trial Judgment with Article 4 of the Fourth Geneva Convention.

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.[26]

The Defence contended that all of the detainees were of Bosnian nationality and that, the fact of their being the same nationality of the party to the conflict which had detained them, put them outside the coverage of the Fourth Geneva Convention, and by extension, no crimes were committed by the accused on this score.

In coming to a finding on this issue, the Trial Chamber considered general arguments relating to nationality, including the well known reasoning in the *Nottebohm* case.[27] In the end, it appealed to the argument that international humanitarian law was designed to provide protection and that the intention of the Security Council could not have been to deny the application of the Fourth Geneva Convention to any particular group or persons on the basis of nationality as defined in domestic law.[28]

While the Trial Chamber came to the right conclusion on the question of "protected person" within the meaning of the Geneva Conventions, perhaps it could have explored a little more the doctrine offered by the *Nottebohm* case on the genuine and effective nationality link in this context. The Trial Chamber stated that:

> [...] it is clear that the victims of the acts alleged in the Indictment were arrested and detained mainly on the basis of their Serb identity. As such, and insofar as they were not protected by any of the other Geneva Conventions, they must be considered to have been "protected persons" within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.[29]

This reasoning could have been followed through to its logical conclusion that nationality is determined by a real, genuine and effective link, rather than by purely formal factors, or even purely by perceptions on the part of a State. If Bosnian Serbs found themselves without the protection of their own national State, and indeed were targeted by it, then from the point of view of protection, they cannot be said to be "nationals of Bosnia" or to have benefitted from a real, genuine and effective link, particularly given the kinds of atrocities they faced. The question then should be not only whether they were protected under Geneva Conventions other than the Fourth, but whether they could really be considered nationals in terms of receiving the international minimum standard of human rights protection from their own State of formal nationality for the purposes of

26. Article 4 of the Fourth Geneva Convention.
27. Nottebohm (Liechtenstein *v.* Guatemala), Merits, Judgment of 6 April 1955, 1955 ICJ Rep. 4.
28. Čelebići Trial Judgment, at para. 263.
29. *Id.*, at para. 265.

the application of the definition of "protected persons" under the Fourth Convention.

This approach would maintain primary focus on the question of the vulnerability of potential victims of armed conflict fully in the spirit of international humanitarian law, rather than to hinge the interpretation of "protected persons" completely on formal criteria of nationality or on State perceptions of threats to national security etc. In short, in the context of an armed conflict situation, an individual should be considered a "protected person" even where he or she may be a national of the violator-State and: faces imminent risk of serious violations of human rights or humanitarian law from his or her own Government; or is exposed to serious violations of international human rights or humanitarian law perpetrated by anyone because the State organs responsible for ensuring the international minimum standard of human rights protection either no longer exist or have been incapacitated.

It is true that the *Commentary of the International Committee of the Red Cross* on Article 4 of the Fourth Convention emphasizes that the definition of "protected persons":

> [...] has been put in a negative form; as it is intended to cover anyone who is *not* a national of the Party to the conflict or Occupying Power in whose hands he is. The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals.[30]

Even this statement concedes that the Fourth Convention must be interpreted against the background of international law. In this spirit, today, one must read the Fourth Convention against the background of *current* international law, which has changed since 1949 when the Convention were adopted. The impressive growth of international human rights norms and implementation testifies to the international community's recognition that every State's relations with its own nationals have become very much a matter of international concern in the area of human rights and fundamental freedoms. Thus, a very restrictive application of Article 4 is no longer supported by general international law.

Moreover, the *Commentary* goes on to note that:

> In the actual course of the discussions, however, certain speakers observed that the term 'nationals' (*ressortissants*, in the French version) did not cover all cases, in particular cases where men and women had fled from their homeland and no longer considered themselves, or were no longer considered, to be nationals of that country.[31]

Thus, even at the time of the adoption of the Fourth Convention, it was recognized that formal criteria of nationality should be treated as less important in

30. *See* J. Pictet (Ed.), Commentary to IV Geneva Convention 46 (1958).
31. *Id.*, at 47 citing the Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II(A), at 814.

certain cases where persons "no longer considered themselves, or were no longer considered, to be nationals of that country".

This more progressive approach was adopted by the Appeals Chamber in the *Tadić Judgment* which made explicit the relevance of ethnicity in this context:

> While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[32]

Ultimately, the Trial Chamber held that the victims in Čelebići camp were "protected persons" under the Fourth Geneva Convention, and moreover, must be considered as persons in the hands of a party to the conflict of which they were not nationals "being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina".[33]

3.4. Article 3 of the Statute[34]

To avoid an interpretation that would render either Article 2 or 3 of the Statute superfluous, the Trial Chamber adopted the Appeal Chamber reasoning in the *Tadić Appeal Decision on Jurisdiction* that:

> [...] Article 3 may be taken to cover 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)[...][35]

Thus, Article 3 is interpreted essentially as a residual clause so as to avoid gaps in the material coverage of the competence of the Tribunal over all serious vio-

32. Prosecutor *v.* Duško Tadić Appeals Chamber Judgment of 15 July 1999, at para. 166, hereinafter referred to as "Tadić Appeal Judgment".
33. Čelebići Trial Judgment, at para. 274.
34. Art. 3, entitled "Violations of the Laws or Customs of War" reads: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."
35. Tadić Appeals Decision on Jurisdiction, at para. 87.

lations of international humanitarian law. The Trial Chamber went on to stress humane treatment as an underlying fundamental principle of the Geneva Conventions and its agreement with the view that the substance of Article 3 common to the four Geneva Conventions has become part of international customary law.

In response to an argument raised by the Defence that, even if common Article 3 had acquired the status of a customary norm, its breach does not import individual criminal responsibility, the Trial Chamber followed the *Tadić Appeal Decision on Jurisdiction* reasoning that nothing inherent in common Article 3 precluded it from forming the basis of international criminal prosecution and punishment. The Trial Chamber then drew further support for this proposition from the International Law Commission's 1996 version of the Draft Code of Crimes against the Peace and Security of Mankind, the express reference to common Article 3 in the Rome Statute of the International Criminal Court,[36] and the Statute and decisions of the International Criminal Tribunal for Rwanda,[37] lumping the results of a codification effort, a multilateral convention not yet in force, and the Statute and jurisprudence of its sister Tribunal together, without any attempt at distinguishing among their status as sources of law or as expressions of the *opinio juris* of States.

The Defence pointed out that even the Report of the Secretary-General on the International Criminal Tribunal for Rwanda[38] stated that its Statute "for the first time criminalizes common article 3 of the four Geneva Conventions". It therefore followed that its application in the context of the ICTY offended the principle of *nullum crime sine lege*. The Trial Chamber responded that:

> [...] the United Nations cannot "criminalize" any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR.[39]

The reasoning to this point in the argument sounds rather too abstract and not very persuasive, particularly given the Trial Chamber's earlier references to "social and political considerations" *vis-à-vis* its method of interpretation. However, following the approach to interpretation it set down earlier in the Judgment, the

36. *See* Art. 8(2)(c) of the Statute of the International Criminal Court (UN Doc. A/CONF. 183/9). The Rome Statute's incorporation of common Article 3 contains some minor changes so that it is made more coherent with the rest of the Rome Statute, loses certain outdated terms, and is freed from the particular constraints of the Geneva Conventions mode of implementation. *See generally,* L.S. Sunga, *The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10),* 6 European Journal of Crime, Criminal Law and Criminal Justice (377-399) 1998.
37. Čelebići Trial Judgment, at para. 274.
38. *See* para. 6 of the Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994); UN Doc. S/1995/134 of 13 February 1995.
39. Čelebići Trial Judgment, at para. 310.

Trial Chamber revisited the provisions of the Socialist Federal Republic of Yugoslavia, which had been adopted by Bosnia and Herzegovina in April 1992. The relevant provisions authorize Bosnian courts to exercise jurisdiction over war crimes "at the time of war, armed conflict or occupation" without distinguishing between international and non-international armed conflict. In effect, this step in the Trial Chamber's reasoning takes the wind out of the sails of the Defence argument that there had been a substantial breach of criminal justice and international human rights standards since:

> [...] each of the accused in the present case could have been held individually criminally responsible under their own national law for the crimes alleged in the Indictment. Consequently, on this ground also there is no substance to the argument that applying the provisions of common article 3 of the Geneva Conventions under Article 3 of the Statute violates the principle of *nullum crimen sine lege.*[40]

Moreover, the Trial Chamber found that the substantive provisions of common Article 3, as well as the provisions of 1907 Hague Convention No. IV respecting the Laws and Customs of War on Land and the Regulations annexed thereto, form part of international customary law.

Significantly, the Trial Chamber expressed the view that, following from the interpretation that Article 3 of the Statute performs a residual function vis-à-vis Article 2 (and one could say, Articles 4 and 5 also), common Article 3 of the Geneva Conventions had to be understood to fall within the ambit of Article 3 of the Statute (although this does not appear self-evidently from a plain reading). However, the Trial Chamber also remarked that it would seem to "fall more logically" within Article 2 of the Statute as a "grave breach" of the Geneva Conventions. This is probably true: the use of simpler definitions promotes greater clarity coherency, and ultimately, greater fairness and effectiveness, in the enforcement of international criminal law.

3.5. Individual responsibility under Article 7(1) of the Statute

In many ways, the section of the Judgment on command and superior responsibility provides some of the more interesting interpretations of international criminal law doctrine.

Article 6 of the Statute reflects the basic principle of individual criminal responsibility in providing that "[t]he International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."

The substance of this simple provision might seem obvious, unless one recalls the dilemma the Allied Powers faced in establishing the Charters of Nuremberg and Tokyo. On the one hand, the Allied Powers felt that the individualization of criminal responsibility and the attribution of criminal guilt to Axis

40. *Id.,* at para. 312.

commanders and soldiers were necessary in order to delegitimize the war ideologies of Nazi Germany and Imperial Japan. The alternative of rounding up war crimes suspects and shooting them could only be perceived as Allied vengeance or a policy of continuing the war. Nor could the wholesale assignment of collective responsibility on the vanquished be counted on to weaken pockets of Axis political resistance at a time when the hard won peace of 1945 was still a fragile prize. Moreover, Hitler had shown the world how the war guilt clauses of the Versailles Treaty and the enforcement of punishing reparations upon post-World War I Germany could be skilfully turned into a major tool for Nazi propaganda. On the other hand, to enforce individual criminal responsibility only upon those who actually carried out such acts as murder, extermination, enslavement, deportation, and other inhumane acts, would net only low level soldiers, leaving political and military leaders who planned and executed 'total war' policies untouched as well as turn a blind eye to such organizations as the Leadership Corps, the Gestapo, SS, German High Command, the Reich Cabinet and the Sturm Abteilungen.[41]

In the Nuremberg Charter, the dilemma between the unfairness of collective responsibility, and the unfairness of individual responsibility for direct perpetrators only, finds resolution in the doctrines of criminal conspiracy and superior responsibility, both of which provide the normative means to enforce individual criminal responsibility beyond the direct perpetrator and to sweep in those who planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the crime or crimes.

However, the doctrine of criminal conspiracy and organization proved contentious during the drafting of the Nuremberg Charter because of its inherent ambiguities, for example, as to whether conspiracy is a crime that stands on its own, or rather, depends upon a finding that a particular crime the subject of a conspiracy was committed.[42] Moreover, the doctrine of criminal conspiracy

41. Of these six corporate entities indicted by the Nuremberg Tribunal, only the first three were found to have been criminal organizations.
42. The last paragraph of Art. 6 of the Nuremberg Charter provides that: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Art. 9 provides that: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Art.10 reads: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." Art.11 adds: "Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization." For an interesting treatment of the doctrine of criminal conspiracy and organization in the Nuremberg Charter and Judgment, *see* S. Pomorski, *Conspiracy and Criminal Organization*, *in* G. Ginsburgs & V.N. Kudriavtsev (Eds.), The Nuremberg Trial and International Law 213-248 (1990).

might be abused in some cases to indict a large number of individuals with little genuine connection to the commission of the crime.

By Articles 6 and 7, the Statute focuses exclusively on natural persons, rather than on criminal organizations, but reaches at planners, instigators, aiders and abettors through Article 7(1) 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.

The Trial Chamber noted the Prosecution and Defence arguments concerning the elements of responsibility under Article 7(1) of the Statute, both of which purport to be based on the holding of the Trial Chamber in the *Tadić Judgment*.[43] The gist of the Prosecution argument was that Article 7(1) does not require that the accused "delivered the fatal blow", only that he either "aided or abetted in the commission of the unlawful act, or that he participated in a common enterprise or transaction which resulted in the death of the victim". In contrast, the Defence, argued that Article 7(1) requires that the accused must have: 1) intended to participate in an act; 2) in violation of international humanitarian law; 3) knowing that the act was unlawful; and that 4) this participation directly and substantially aided the commission of the illegal act, which admittedly required neither his physical presence at the scene of the crime nor his direct participation in the commission of the crime. Conversely, mere physical presence

43. In the Tadić Judgment, the Trial Chamber held that: "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present." Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to be "concerned with the killing." However, the acts of the accused must be direct and substantial. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question." *See* Tadić Trial Judgment, Case No. IT-94-1-T, 7 May 1997, at paras. 689-692.

of the accused at the scene of the crime was not sufficient to prove that he aided and abetted in the crime.

Concluding on this point, the Trial Chamber decided to follow the approach taken in the *Tadić Judgment*, which tallies neither with the Prosecution's rather broad test that the accused "either aided and abetted in the commission of an unlawful act or participated in a common enterprise or transaction", nor the Defence's rather narrow test, point (3) of which seems to wipe out the principle *ignorantia legis neminem excusat,* while point (4) maintains the *Tadić Judgment* criterion that the aid must be "direct and substantial" in the commission of the illegal act.[44]

3.6. The principles and elements of command / superior responsibility in Article 7(3)

The doctrine of superior responsibility expressed in Article 8 of the Nuremberg Charter[45] (Article 6 of the Tokyo Charter) finds roots in the medieval laws of war – illuminated by an ancient trial conducted in 1474 in which an international military tribunal found Peter von Hagenbach criminally responsible for such serious crimes as murder and rape committed by subordinates under his command during his attack on Breisach on the Upper Rhine.

In its discussion on the legal character of command responsibility (also known as 'superior responsibility') in international law, the Trial Chamber noted that neither the Nuremberg and Tokyo Charters, nor Control Council Law No. 10, specifically addressed the *failure* of a superior to act. Clarification on the criminal responsibility of commanders under international law in failing to prevent or punish the unlawful acts of subordinates is found in a number of post-World War II cases to which the Trial Chamber referred.

According to the Prosecution, Article 7(3) required that:

> (1) The superior must exercise direct and / or indirect command or control whether de jure and / or de facto, over the subordinates who commit serious violations of international humanitarian law, and / or their superiors.
>
> (2) The superior must know or have reason to know, which includes ignorance resulting from the superior's failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.
>
> (3) The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.[46]

The Defence, arguing instead a five-fold test, added the following requirements to the criteria contended by the Prosecution:

1. that the superior had to have had either the status of a commander, or that of a civilian exercising the equivalent of military command authority (not merely direct or indirect *de jure* or *de facto* command or control);
2. that actual knowledge on the part of the superior of the crime (not necessarily including ignorance resulting from failure to provide proper supervision); and,
3. that the commander's failure to act caused the crime actually committed (thereby introducing a very high burden on the Prosecution to prove a very direct relation between commander and subordinate for crimes already committed).

The Prosecution of course wished to free the application of the doctrine of superior responsibility from the straitjacket of the formal command hierarchy, particularly given the very fluid and informal structures operating in many of the theatres of armed conflict in the former Yugoslavia. If command responsibility were to apply only on an official *de jure* basis, it would be easier for armed forces or militia to evade criminal responsibility by avoiding formalized command and control structures or clear designations of rank and hierarchical reporting duties.

In response, the Defence for Delalić and Delić argued that only commanders possess the authority to issue binding orders in their own name, and that the approach taken in Article 86 of Protocol I and Article 7(3) of the Statute does not

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44. Just before expressing its accord with the approach taken in the Tadić Trial Judgment, the Trial Chamber expatiated on the mental element involved in aiding and abetting in a crime: "As regards the mental element of such participation, it is the Trial Chamber's view that it is necessary that the act of participation be undertaken with knowledge that it will contribute to the criminal act of the principal. The Trial Chamber agrees that the existence of this *mens rea* need not have been explicitly expressed, but that it may be inferred from all relevant circumstances. Nor is it required that the Trial Chamber find that there was a pre-existing plan to engage in the criminal conduct in question. However, where such a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct. Depending upon the facts of any given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and a better to, the crime in question." Čelebići Trial Judgment, at paras. 339-341.

45. Art. 8 of the Nuremberg Charter reads: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Art. 7 of the Charter is relevant also because it affirms that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

46. Čelebići Trial Judgment, at para. 344.

intend to import criminal responsibility on superiors solely because they hold a higher rank than the perpetrator of the crime.

Referring to the ICRC Commentary to the Additional Protocols, the Trial Chamber opined that, in situations like the former Yugoslavia where formal structures have crumbled, "persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so."[47] The Trial Chamber thus accepted the Prosecution's contention that superior responsibility may attach to *de facto* or *de jure* superiors and, citing cases from the Nuremberg and Tokyo Tribunals, came to the view that both non-military and military superiors may engage criminal responsibility for the unlawful acts of their subordinates.

Concerning the phrase "knew or had reason to know", the Trial Chamber ruled that it must be proved either that the accused superior had actual knowledge of the crimes committed by subordinates through direct evidence,[48] or in the absence of actual knowledge, that:

> [...] some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3).[49]

3.7. Elements of the offences

The point of departure adopted by the Trial Chamber in respect of the elements of offences was provided by the Secretary-General in his Report submitted pursuant to Security Council resolution 808 and to which the Statute is annexed,[50] to the effect that the Tribunal must apply only established international legal norms, not make new law. In recognizing the principle of the non-retroactivity

47. Čelebići Trial Judgment, at para. 354.
48. The number, type, scope and time of crimes committed, as well as the number and type of troops involved, logistics, geographic location, "tactical tempo of operations", scope, the *modus operandi* of similar acts, officers and staff involved and the location of the commander at the time the crimes were committed, are adopted by the Trial Chamber as reference points by which to determine on an objective basis whether a superior had actual knowledge of the crimes committed by subordinates. *Id.*, at para. 386.
49. *Id.*, at para. 393.
50. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), including the Statute of the Tribunal, UN Doc. S/25704 of 3 May 1993 & Add.1 of 17 May 1993.

of criminal law, the Trial Chamber assured the parties that it considered itself bound:

> [...] to look to customary international law in order to arrive at a determination of the elements of the offences alleged in the present case as they stood during the time-period to which the Indictment relates. These offences are here categorised under the following headings: wilful killing and murder; offences of mistreatment; unlawful confinement of civilians; and plunder.[51]

At this point, it is valuable to turn directly to the Trial Chamber's consideration of the elements of these crimes.

3.7.1. Wilful killing and murder

The Indictment's charges on murder refer both to "wilful killing" under Article 2 of the Statute and "murder" under Article 3 of the Statute. Accordingly, it was incumbent upon the Trial Chamber to consider the question as to whether the definitions of "wilful killing" versus "murder" might cover different elements, in effect, constitute separate crimes. On this question, the Trial Chamber could find no material differentiation between "wilful killing" and "murder", particularly since both terms are found in the Geneva Conventions – "wilful killing" in the grave breaches provisions[52] and "murder" in common Article 3 – but the two sets of provisions differ according to the status of the armed conflict (international or non-international) and not according to the elements of the offence.

The Prosecution and the Defence agreed that the *actus reus* of "wilful killing" and "murder" were identical in that it concerns the death of the victim as a substantial cause of the conduct of the accused. However, the Prosecution and Defence differed on the *mens rea* in respect of these two provisions. The Prosecution urged upon the Trial Chamber a broad interpretation of 'wilful' to include reckless acts in addition to specific criminal intent to kill, but not mere negligence, while the Defence argued that recklessness could not come within the scope of either provision. Moreover, the Defence pointed out that the English and French renditions of the Geneva Conventions differ: the French employs the term *'l'homicide intentionnel'* – a narrower term than the English term 'wilful' – and that the accused is entitled to benefit from the narrower reading in his favour.

The Trial Chamber wisely steered away from discussing cognates of the terms 'wilful killing' and 'murder' as they might figure in the domestic laws of States, on the ground that the use of such terms in these contexts often is encumbered by their specific legal environment. However, the Trial Chamber did note the Prosecution's argument that "recklessness" was explicitly indicated in

51. Čelebići Trial Judgment, at para. 419.
52. These are Arts. 50, 51, 130 and 147 in the four Geneva Conventions respectively.

the discussion of 'wilful' entertained in the Commentary to the Additional Protocols and concluded that:

> [...] the necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life.[53]

This standard has the merit of avoiding the development of two legally distinct notions of 'wilful killing' and 'murder', thereby reducing confusion and promoting simplicity in international criminal jurisprudence. Also, reading in 'reckless disregard' as an element of these two terms maintains flexibility in their respective practical application without broadening them unduly.

3.7.2. *Offences of mistreatment*

The Trial Chamber followed the Indictment's categorization of mistreatment into four crimes: torture; the wilful causing of great suffering or serious injury to body or health; inhuman treatment; and cruel treatment. The first three crimes constitute grave breaches of the four Geneva Conventions and therefore appear in Article 2 of the Statute. Torture and cruel treatment are prohibited by common Article 3(1)(a) of the Geneva Conventions. In fact, 'cruel treatment' is not found in the Statute, but has been read into Article 3 of the Statute, which the Trial Chamber reiterated was to be considered a residual provision.[54] As with the other crimes, the Trial Chamber acknowledged that it had to establish the status of the norm prohibiting each crime at international customary law.

Differentiating among these forms of mistreatment, the Trial Chamber found that torture was the most narrowly defined,[55] whereas the crime of "wilfully causing great suffering or serious injury to body or health" was not conditioned by the kinds of restrictions operating on the definition of an act of torture, namely, "severe pain or suffering" and the specific intention and official status

53. Čelebići Trial Judgment, at para. 439.
54. Reference to "cruel treatment" naturally is found in Art. 4 of the Statute of the International Criminal Tribunal for Rwanda which incorporates the substance of Art. 3 common to the four Geneva Conventions, 1949.
55. Art. 1 of the United Nations Torture Convention (1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM 1027 (1984)) defines "torture" as: "[...] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." *See further* L.S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation 129-142 (1997).

of the perpetrator. The Trial Chamber opined that both these categories of crimes constituted forms of inhuman treatment, but that the category of 'inhuman treatment' swept in certain acts that might not come within the scope of 'torture' or "wilfully causing great suffering or serious injury to body or health". The category of 'cruel treatment', held the Trial Chamber, "extends to all acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity."[56]

This general view of the interrelation among torture, the wilful causing of great suffering or serious injury to body or health, inhuman treatment and cruel treatment, seems to conform well to the available norms in customary international law, and also provides a coherent order among these crimes according to their severity and the circumstances surrounding their commission. However, in future, borderline cases may complicate the application of these relatively neat categories, but this remains to be seen.

As regards the status of norms prohibiting torture, the Defence argued that the definition provided for in the UN Torture Convention[57] has not entered customary international law, but the Trial Chamber rejected this argument, asserting that there could be no doubt of its prohibition in both conventional and customary international law. Moreover, the Trial Chamber argued that:

> Torture is also prohibited by a number of regional human rights treaties, including the European Convention on Human Rights [...] the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture ... the African Charter on Human and Peoples' Rights. [...] In addition, there are two international instruments that are solely concerned with the prohibition of torture, the most significant of which is the Torture Convention. This Convention was adopted by the General Assembly on 10 December 1984 and has been ratified or acceded to by 109 States, including the SFRY, representing more than half of the membership of the United Nations. It was preceded by the Declaration on the Protection from Torture, which was adopted by the United Nations General Assembly on 9 December 1975 without a vote. [...] Based on the foregoing, it can be said that the prohibition on torture is a norm of customary law. It further constitutes a norm of *jus cogens*, as has been confirmed by the United Nations Special Rapporteur for Torture. It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances. [...] Despite the clear international consensus that the infliction of acts of torture is prohibited conduct, few attempts have been made to articulate a legal definition of torture. In fact, of the instruments prohibiting torture, only three provide any definition.[58]

56. Čelebići Trial Judgment, at para. 443.
57. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM 1027 (1984), *adopted by consensus* by the General Assembly on 10 December 1984, *opened for signature* on 4 February 1985, *entered into force* on 26 June 1987. The Convention forms the Annex to General Assembly Resolution 39/46, UN Doc. A/RES/29/46.
58. Čelebići Trial Judgment, at paras. 453-455.

This affirmation by the Trial Chamber of the customary status of norms prohibiting torture, and that it forms part of *jus cogens* is to be welcomed, particularly as it seems motivated by the right sentiments.

However, from the technical point of view, the question is what test has the Trial Chamber applied in determining the existence of such norms as part of international customary law and forming part even of *jus cogens*? Despite the insistence of almost every Government that it does not tolerate torture in its territory, torture remains a widespread phenomenon around the world. In light of the requirement that it is actual general and widespread State practice that, alongside *opinio juris*, combine to form evidence of a customary rule of international law, one must wonder how the Trial Chamber could have jumped from the words of Governments in the form of declarations, resolutions and conventions, to customary law, and even *jus cogens*, without thorough analysis.

One way the Trial Chamber could have reached the same result, but through a technically more precise assessment of the applicable law, would be to have restricted its findings on torture only to situations of armed conflict where there is more solid ground in the form of customary international law. The Geneva Conventions claim truly universal status, unlike the UN Torture Convention, which as the Trial Chamber itself indicated, has been ratified by around only half the States of the international community. This alternative approach might lessen the impression that the Trial Chamber did not give enough weight to the principle of *pacta sunt servanda* as regards Torture Convention non-parties. In addition to their universal endorsement by the international community, the application of the Geneva Conventions benefit from the overall mutual reciprocity regime of international humanitarian law, in particular, that often the authorities on one side of a conflict refrain from perpetrating acts of torture against POWs in the knowledge that the other side is in a position to do the same, which in some cases may enhance the effectiveness of the humanitarian law prohibition of torture.

That being said, although the Trial Chamber may have leaned more on moral considerations rather than on a technically objective appreciation of the applicable international law on this point, its application of the Torture Convention as part of international customary law, if not overturned on appeal or by subsequent Judgments, can itself be accepted as an important and welcome development in international practice.

On the question of rape, the Trial Chamber found numerous sources of support, including the *Akayesu Judgment*[59] of the International Criminal Tribunal for Rwanda, for its finding that rape constitutes torture – an important recognition of the extreme severity of the crime of rape. Unfortunately, neither Articles 2 or 3 of the Statute explicitly mention 'rape'. Rape is only referred to in Article 5(g) on crimes against humanity, which is encumbered by a clumsily drafted

59. Prosecutor *v.* Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998.

chapeau that was out of date even before the Statute was adopted, limiting criminal responsibility for crimes against humanity only "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". The overly restrictive application of Article 5, far narrower than the definition of crimes against humanity in general international law, may account for the Prosecution having brought the charge of rape under Articles 2 and 3, rather than Article 5.

As for inhuman treatment, the Trial Chamber concluded that in order to qualify as such, the act or omission had to have been intentional, deliberate rather than accidental, and that it caused "serious mental or physical suffering or injury or constitutes a serious attack on human dignity"[60] noting that this interpretation finds support in a plain reading of the Geneva Conventions provisions.

On the question of the definition of 'cruel treatment', the Prosecution argued that it covers essentially the same elements as inhuman treatment, but is not restricted by the conditions limiting the definition of 'torture' as set out in the UN Torture Convention, 1984. Moreover, held the Trial Chamber, 'cruel treatment' constitutes:

> [...] an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.[61]

The Trial Chamber further remarked that the relevant legal standards governing inhuman conditions in Čelebići camp were "absolute and not relative", that is, they derive from minimum standards and cannot be pleaded against on the basis of special circumstances specific to the camp itself or to surrounding factors.

3.7.3. Unlawful confinement of civilians and plunder

The Trial Chamber reviewed the Commentary to the Fourth Geneva Convention and found that the confinement of civilians is permissible in certain situations, but must still conform to Articles 42 and 43. Article 5 of Geneva Convention IV provides that the rights of civilians may be limited by the Occupying Power in such cases where the individual protected person is under definite suspicion or engaged in activities hostile to the security of the State, or in the case of spies or

60. Čelebići Trial Judgment, at para. 543.
61. *Id.*, at para. 552.

saboteurs. It is to be noted, however, that the Fourth Geneva Convention provides for a minimum standard of treatment as per Article 27, even in cases where the rights of civilians may be put under limitation. The Trial Chamber came to the very reasonable conclusion that:

> 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.

The upshot of this ruling is that Occupying Powers must implement fully the procedural safeguards of the Geneva Conventions designed to provide humanitarian protection in time of armed conflict.

The Trial Chamber considered charges relating to the plunder of money, watches and other valuable property of Čelebići camp detainees last. Plunder is listed in Article 3(e) of the Statute. The crime of plunder is well established in customary international law as codified by the Hague Regulations annexed to 1907 Hague Convention No. IV on the Laws and Customs of War on Land and reaffirmed in all four of the Geneva Conventions, 1949. The Defence argument was that the Statute was intended to sweep in the more serious violations of international humanitarian law, perpetrated in a systematic way in a particular territory, not with respect to individual petty violations. However, the Trial Chamber noted that in a number of military trials conducted after the Second World War, certain isolated cases of plunder were in fact prosecuted and punished as war crimes.

4. What Sentences Were Handed Down?

4.1. The Tribunal's approach

Article 24 of the Statute provides that:

> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

> 3. In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.[62]

Accordingly, the Trial Chamber looked to the Criminal Code of the Socialist Federal Republic of Yugoslavia, determining that the maximum length of imprisonment was limited to 15 years, except in cases where the death penalty was prescribed. In the case of crimes for which the courts in the former Yugoslavia could order the death penalty, the Criminal Code also left them the option to substitute a sentence of death with 20 years imprisonment. In case there were mitigating factors in respect of the commission of such crimes, the Yugoslav courts were authorized to order a term of imprisonment between 5 and 15 years.

The Trial Chamber then considered whether the maximum term of imprisonment the law of the former Yugoslavia prescribed conflicted with the application of the Tribunal's Rule 101(A) on penalties which reads: "A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life." The Trial Chamber concluded that Article 24(1) and Rule 101(A) do not conflict by virtue of the fact that Article 24(1) permits the Trial Chamber to "have recourse to" to the practice of the former Yugoslavia on prison sentences i.e. to refer to such practice as a possible source of assistance, rather than to be strictly bound by it. Construing the term 'practice' to refer to the actual sentencing decisions of Courts, rather than merely to the legislation in the former Yugoslavia, the Trial Chamber observed that:

> [...] there is an obvious discrepancy and conflict in the sentencing regimes of the International Tribunal and that of the courts of the former Yugoslavia. There is no provision for the Tribunal to impose a sentence of death. It can impose a life sentence. In contrast, the SFRY Penal Code allowed the imposition of a sentence of death in certain cases. However, the courts of the former Yugoslavia were not allowed to impose a prison term of more than 20 years, even for criminal offences involving the death penalty. Where such differences or discrepancies exist between the Statute and Rules of the International Tribunal and the SFRY Penal Code concerning maximum and minimum sentences, how should it be resolved?[63]

The Defence for Delić argued that the maximum sentences found in the practice of the former Yugoslavia should benefit his client because, at the time the offence was committed, the Statute had yet to be adopted, nor was the Tribunal yet in existence. Were the Tribunal to impose a sentence on the accused greater than that prescribed by the law of the former Yugoslavia in force at the time the crimes were committed would violate the basic principle of the non-retroactivity

62. The Statute, *supra* note 4.
63. Čelebići Trial Judgment, at para. 1195.

of criminal law.[64] Interestingly, the Yugoslav Criminal Code contained a Chapter entitled "Criminal Acts against Humanity and International Law", Article 142 of which prohibited such acts as killing, torture, inhumane treatment of the civilian population, causing great suffering or serious injury to body and health, unlawful forced transfer of populations, intimidation and terror, and the unlawful confinement in concentration camps and unauthorized areas. The Criminal Code imposed a minimum sentence of five years imprisonment and a maximum penalty of death for the commission of any of these crimes.

In determining the sentences, the Trial Chamber underlined its agreement with the *Erdemović Sentencing Judgment*[65] and *The Prosecutor* v. *Jean Kambanda*[66] which held that the general practice concerning sentencing in the respective countries of the former Yugoslavia and Rwanda could be taken by the Tribunal to provide guidance on the length of prison terms, but that domestic practice did not bind either of the International Criminal Tribunals.

The Trial Chamber then considered the argument raised by Delić's counsel that the Tribunal was bound by the basic principle of *nulla poena sine lege* not to impose a term of imprisonment extending beyond 15 years, because the maximum sentence applicable under Yugoslav law operating at the time the crimes were committed was either death or 20 years' imprisonment, and because the Statute did not allow the death sentence, that left only 15 years' imprisonment as the only possible maximum punishment. A similar view had found favour with the Trial Chamber in the *Tadić Sentencing Judgment* that the International Tribunal was bound not to exceed a maximum sentence. However, the Trial Chamber in the *Tadić Sentencing Judgment* held the maximum term of imprisonment was 20 years, not 15.

Ultimately, the Trial Chamber in the *Čelebići case* rejected the Defence argument that the maximum sentence had to be set at 15 years, holding that it was:

> [...] an erroneous and overly restrictive view of the concept of *nullum crimen sine lege*. This concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.[67]

The Trial Chamber continued that it was:

> [...] of the opinion that the governing consideration for the operation of the *nullum crimen sine lege* principle is the existence of a punishment with respect to the offence. [...] The fact that the new punishment of the offence is greater that the former punishment does not offend the principle.[68]

64. In this connection, the Tribunal referred incorrectly to the principle of *nullum crimen sine lege*, i.e. no crime without law, which was not what was in issue at this stage, but rather the related principle *nulla poena sine lege* i.e. no *punishment* without law.
65. Prosecutor *v.* Erdemović, Sentencing Judgment, Case No. IT-96-22-T, 29 November 1996.
66. Prosecutor *v.* Jean Kambanda, Case No. ICTR 97-23-S, 4 September 1998.
67. Čelebići Trial Judgment, at para. 1210.

The Trial Chamber then reviewed the factors of retribution, the protection of society, rehabilitation, deterrence, and motives for the commission of the crimes relative to the sentencing of Mucić, Delić and Landžo.

4.2. The particular sentences

In the result, Delalić was found not guilty of all 11 counts charging him with responsibility for grave breaches of the Geneva Conventions and violations of the laws and customs of war. The Trial Chamber found that Delalić had not exercised command and control in Čelebići camp and that he therefore did not incur any criminal responsibility for the acts or omissions of persons alleged to have been his subordinates. He was equally acquitted of the charge of having directly participated in the unlawful confinement of civilians.

Mucić was found guilty of 11 of the 13 counts of grave breaches of the Geneva Conventions and violations of the laws and customs of war he had been charged with in connection with his role as a camp commander in respect of the death of 9 persons, the torture of 6 persons, the causing of great suffering or serious injury to 4 persons and the commission of inhuman acts against 6 persons, as well as for his direct participation in the unlawful confinement of civilians in inhumane conditions, and given seven years' imprisonment. The Tribunal stated that it was "appalled by the inadequacy of the food and water supplies, and medical and sleeping facilities that were provided for the detainees, as well as the atmosphere of terror which reigned in the Čelebići prison-camp" – conditions over which Mucić had primary responsibility. Mucić also failed to take disciplinary action against those under his command who committed serious crimes against detainees.[69] On the other hand, no witness testified on the direct participation of Mucić in any of the murders or tortures for which he was held responsible in the capacity as a superior. The Tribunal further found that Mucić's culpable acts and omissions were the product of "individual failing as an aspect of human frailty, rather than one of individual malice."[70]

68. *Id.*, at para. 1212.
69. The Trial Chamber held that: "In the instant case, Mr. Mucić, by means of deliberate neglect of his duty to supervise his subordinates, thereby enabling them to mistreat the detainees in the Čelebići prison-camp, has been imputed with knowledge of their crimes. Mr. Mucić was consciously creating alibis for possible criminal acts of subordinates. It would constitute a travesty of justice, and an abuse of the concept of command authority, to allow the calculated dereliction of an essential duty to operate as a factor in mitigation of criminal responsibility. In this particular case, the reason for staying away from the prison-camp at nights without making provision for discipline during these periods, which was to save himself from the excesses of the guards and soldiers, is rather an aggravating factor." *See id.*, at para. 1250.
70. *Id.*, at para. 1248.

Delić was found guilty on 13 of the 38 counts of which he had been charged of grave breaches Geneva Conventions and violations of the laws and customs of war involving the murder of 2 persons, the torture and rape of 2 persons, causing great suffering or serious injury to one person, and for inhumane acts involving the use of an electrical device and for inhumane conditions. The Trial Chamber sentenced Delić to a prison term of 20 years for these crimes, noting the extreme brutality with which he perpetrated them. Delić was found guilty also of torture for the rapes of two women detainees in Čelebići camp. The Prosecution had requested a life sentence, and has appealed the Trial Chamber's finding that Delić was not guilty on the charges relating to his responsibility as a commander.

Landžo was found guilty of 17 out of 24 counts of grave breaches of the Geneva Conventions and violations of the laws and customs of war, and sentenced to imprisonment for 15 years for the killing of 3 persons, the torture of 3 others, having caused great suffering or serious injury to 2 other persons and for inflicting inhumane conditions on the detainees of Čelebići camp. The Defence pleaded Landžo's youth – he was 19 years' old at the time he committed the crimes in Čelebići camp – should be considered an important mitigating factor in sentencing, together with his family background, character, his admissions of guilt and feelings of remorse, his attempt to co-operate with the Prosecution and his voluntary surrender to the authorities of Bosnia and Herzegovina. The Defence argued that Landžo should not be sentenced to more than 5 years imprisonment for each offence which should run concurrently.[71] The Prosecution, on the other hand, contended that, notwithstanding his youth and mental state at the time he committed the offences, which admittedly could be considered mitigating factors, Landžo still represented a danger to society. Moreover, Landžo's offer of cooperation with the Tribunal was more in the form of a plea bargain to ensure that, in exchange for a guilty plea, he would receive a concurrent sentence of not more than 5 years' imprisonment – a proposal the Prosecution had refused. The Tribunal decided that, in view of the fact that Landžo never admitted his guilt, his expressions of remorse and only partial admissions of guilt, could not be considered to mitigate significantly the sentence he was due. Moreover, Landžo expressed remorse in a letter to the Trial Chamber only once the trial had finished, rather than in open court where victims and witnesses were present, making it clear that his aim was more to seek concessions from the Trial Chamber than to make any genuine apology.

Interestingly, the Defence argued also that the Tribunal's jurisdictional authority restricted it to targeting only individuals who possessed command authority, whereas Landžo was "merely an ordinary soldier". In response, the Tribunal noted:

71. *Id.*, at para. 1278.

> [...] that the statement issued in May of [1998] by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence, indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landžo would appear to fall within this exception.[72]

The Tribunal rejected also the Defence's contention that Landžo was merely acting under orders because the evidence did not indicate that he committed the crimes reluctantly, but to the contrary, "took some perverse pleasure in the infliction of great pain and humiliation". Neither did Landžo voluntarily surrender to the Tribunal, but was summoned by the Bosnian authorities, detained there and then transferred to the Tribunal on 13 June 1996.

While the Trial Chamber refused to accept the Defence's contention of diminished responsibility for Landžo on account of his age and poor family background, it did take note of the evidence of mental health experts which indicated that he had an "immature and fragile personality", that he had no military training or instruction concerning proper behaviour towards detainees, and had been surrounded by the harsh environment of the armed conflict raging in the region and the events in Konjic municipality in particular. Landžo's Defence has filed an appeal on the verdict and sentence.

According to the normal practice of domestic courts, the Trial Chamber recognized that the time the convicted persons spent in detention pending their surrender to the Tribunal and pending trial as well as any time spent in detention at the Tribunal's detention facility, should be credited towards their sentence.[73]

5. Concluding Comment

While one can agree with most of the Trial Chamber's holdings, the methodology seems to employ some unfortunate shortcuts that weaken the Judgment. On a number of points, for example, the proper application of international instruments, the customary or *jus cogens* status of legal norms prohibiting certain crimes and the question of nationality in relation to Geneva Convention IV, the Trial Chamber could have delved deeper into the norms of general international law for guidance. Its treatment of these questions leaves an impression that it reached conclusions on these issues rather too quickly.

These methodological concerns aside, the *Čelebići case* has no doubt reaffirmed and substantially advanced international criminal law doctrine. The Trial

72. *Id.*, at para. 1281.
73. These were 2 years, 7 months and 29 days for Zdravko Mucić; 2 years, 6 months and 14 days for both Hazim Delić and Esad Landžo.

Chamber's adoption of the *Tadić Judgment* holding that Article 3 of the Statute functions as a residual provision, reaffirms this coherent interpretation of the relationship between Articles 2 and 3. The reaffirmation that Article 3 common to the four Geneva Conventions forms part of customary international law is of course valuable.

Perhaps most interesting is the Trial Chamber's clarification of the meaning and scope of the principle of command responsibility on such elements as the degree of knowledge required on the part of the superior to engage criminal responsibility for an unlawful act or omission of subordinates. The Trial Chamber's clear emphasis on the principle that superiors may engage criminal responsibility even in informal structures as long as in fact there exists an effective command, has to be welcomed, particularly in light of the growing incidence of non-international armed conflicts compared to classic inter-State war situations. However, to minimize the risk of abuse, this doctrine will surely have to be refined through future cases. As for the elements of crimes, the Judgment in the *Čelebići case* helps clarify and develop a useful regime for the definitions of the various forms of mistreatment that qualify as crimes under the Statute, and by identifying rape as a form of torture, underlines the particular severity of rape.

To conclude, the *Čelebići case* provides a rich source of interpretation on the principles, doctrine and practical application of international criminal law, as well as on various elements of international human rights and humanitarian law. In moving from all main background factual considerations to a general interpretation of applicable law, instead of analyzing each legal issue in isolation, the Judgment exhibits a high degree of logical coherence. This approach allowed the Trial Chamber to view the scope and content of the relevant norms in the context of the legal regime in which they are found and guarantees that the Judgment of the Trial Chamber will be read for a long time to come.