OFFICE OF THE PUBLIC PROSECUTOR OF KOSOVO
PP.Nr.68/2000
PPP Nr. __/2001
K. 31/99
On 30.11.2001
PRISTINA

TO: THE SUPREME COURT OF KOSOVO

Pursuant to Article 370, para. 2, of the LCP, on the appeals filed against the decision of the District Court in Gjilan P.No.31/99, dated 06.03.2000 I submit the following:

OPINION on APPEALS of Convictions of Momcillo Trajkovic

TABLE OF CONTENTS

Primary Issue Presented in the Appeal

The primary issue presented by this appeal of a conviction of Momcillo Trajkovic for:

(1) War Crimes pursuant to the FRY Criminal Code Art 142 and under international law;

(2) Attempted Murder pursuant to Art 30 Para 1 of the Criminal Code of Kosovo in connection with Art. 19 of the FRY Criminal Code;

(3) Illegal Possession of Weapons pursuant to Art 199 para 3 of the FRY Criminal Code in connection with para 1 of the Criminal Code of Kosovo

is whether the facts as stated in the verdict, even if true, can support such convictions as a matter of law. Also at issue are whether there were [1] serious violations of criminal procedure; [2] erroneously and incomplete establishment of facts relied upon for guilt; [3] violation of criminal law, and [4] improper decision on the amount of criminal sanction.

Short Answer

The Trial Panel of the District Court of Gjilan convicted Momcillo Trajkovic of War Crimes, Attempted Murder, and Illegal Possession of weapons under Yugoslav law. This International Public Prosecutor has reviewed the verdict and reasoning, the trial transcript, the investigation *proces verbale,* and other evidentiary materials, as well as relevant case law from the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, legal commentaries for the FRY Criminal Code, recent international commentaries on humanitarian international law, other international and national case law on crimes against humanity and war crimes, and the statutory provisions of the International Criminal Court.

Using these court records, evidentiary materials, case materials and authorities, this Opinion is that when the law is applied to the testimony which is relied upon by the Trajkovic court, the result does not support the convictions for:

(1) War Crimes or Crimes against Humanity, pursuant to the FRY Criminal Code Article 142, and under international law;

(2) Attempted Murder pursuant to Art 30, Paragraph 1 of the Criminal Code of Kosovo in connection with Art. 19 of the FRY Criminal Code; and

(3) Illegal Possession of Weapons pursuant to Art 199, paragraph 3 of the FRY Criminal Code, in connection with paragraph 1 of the Criminal Code of Kosovo.

Accordingly, it is the Opinion of the International Prosecutor of the Office of the Public Prosecutor of Kosovo that the Supreme Court should:

1. Cancel the conviction of the accused for War Crimes and Crimes against Humanity [1], Attempted Murder, pursuant to LCP Art. 385(1), because the state of the facts was erroneously established in relation to all charges on the basis that:

   (1) there is no direct or conclusive evidence that the appellant acted personally or ordered the commission of the organized actions leading to the war crimes and crimes against humanity alleged;

   (2) there is no direct or conclusive evidence that the appellant should be held liable under command responsibility duties and failure to act to prevent and punish the commission of the organized actions leading to the war crimes and crimes against humanity alleged;

   (3) there is no evidence stated of the *mens rea* required in the case of attempted murder nor of the inexplicable finding of shooting from a window,

---

1 The court having convicted the defendant of War Crimes proceeded also to qualify those crimes as "Crimes against Humanity" for the reasons as stated therein. This qualification and conviction are not the subject of an appeal by the appellant, but the Public prosecutor now seeks to raise the issue " sua sponte" or "ex officio" with the understanding that the Court under LCP Art. 376 can examine the issues "automatically."

2 Cancel the conviction of the accused for War Crimes and Crimes against Humanity, Attempted Murder and possession of Illegal Weapons pursuant to LCP Art.385(1), because there were essential violations of the principles of criminal procedure including:

(a) Failure to call an essential witness properly proposed by the defense on the issue of command responsibility which is the basis for conviction for war crimes and crimes against humanity (violation of LCP Arts. 366(1), 364(2), and 363(3)) requiring canceling War Crimes and Crimes Against Humanity convictions;

(b) Improper composition of the Trial Panel (violation of LCP Art. 364(1)), which also resulted in the violation of Basing Verdict on Legally Nonexistent or Inadmissible Evidence (LCP Art. 364(8)), requiring canceling all convictions;

(c) Improper use of investigative *proces verbale* without meeting the requirements of LCP Art. 333, which resulted in violating Basing Verdict on Legally Nonexistent or Inadmissible Evidence (LCP Art. 364(8)), requiring canceling Possession of Illegal Weapons conviction [witness Bryan Hunlock] and any reliance on 11 May murder of victim Nevzat Kryeziu [witness Lulzim Kryeziu];

(d) Violation of the principle of the right of defense to be present in all investigative hearings, LCP Art. 364(11/2)), requiring canceling all convictions;

(e) Failure to render a comprehensible and non contradictory verdict (LCP Art. 364 (11)), requiring canceling all convictions;

(f) The direct application of the internationally recognized Crime Against Humanity against the accused, not as one element of YCC Art. 142, but without any domestic enabling legislation and compared to the statutory scheme of Articles 141 and 142, which is a law which could not be applied has been applied to the criminal act, and under which the act for which the accused is being prosecuted is not a Crime Against Humanity (Art. 365 (1) and (4)),

all being to the detriment of the accused.

3. Return the case for retrial, pursuant to LCP Art. 385(1), because the state of the facts [of reliability and credibility] on the issues of the accused's personal responsibility or

participation in the crimes alleged, which need retrial and hearing of additional witnesses in light of the issues brought up by the defense appeals, as it would be too burdensome on the Supreme Court to use the option of an evidentiary hearing under LCP Arts. 373-374;

4. Detention of the accused should be re-evaluated by this Supreme Court pursuant to LCP Art. 385(4). It is the opinion of this International Public Prosecutor of Kosovo that only the provisions of LCP Art. 191(2)(1-2) apply.

I. Case Summary[2]

A. FACTS RELIED UPON BY THE COURT:

The accused Momcillo Trajkovic is an ethnic Serb and during the period in question he resided in the village of Kamenica in Kosovo. The accused was the Chief of Police in Kamenica, a predominantly Serbian village. He was charged with purposely and systematically planning, ordering and executing criminal acts against the unarmed civilian Albanian populations of Kamenica and the surrounding villages of Krileve, Leshtar, Rahovic and Strezovc, amongst others, by giving orders to subordinates, by carrying out orders of superiors and by his own actions, during the period from March 24, 1999 until the day of the entry of the International Forces in Kosovo.

A. Attacks on Albanian Civilians

---

[2] The facts are drawn primarily from the trial transcript but are supplemented by the investigation *proces verbale* and the verdict reasoning where noted. For the purposes of this opinion, this International Public Prosecutor has stated the facts relied upon in the verdict, and assumed for the purpose of this brief that the witnesses are not lying, and stating what they believe, because even with those facts, the law requires reversal of the conviction. Simply believing that the accused gave orders, without any factual basis, can render such a statement as one made in good faith belief, but unreliable and speculative, and insufficient upon which to base critical facts to convict.

I also note that the arguments demonstrating the unreliability and falsity of some of the crucial facts, which were made by the defense briefs, are persuasive, but given the ultimate opinions stated on the law and facts, it was not necessary to continue further and determine which witnesses should be characterized as stating knowing falsehoods.

Momcillo Trajkovic, as Chief of Police, was accused, often in general terms without specifics, of mistreating Albanian Kosovar citizens in Kamenica.[1] From 1998 to 1999, the accused would routinely "every two weeks" send groups of policemen to nearby areas to terrorize (presumably Albanian) residents[2] and "regularly" enter their homes to see if families were supporting the KLA soldiers[3]. It must be noted that the Albanian Kosovar residents are assuming the accused commanded such police intrusions.

The accused was alleged by witnesses to have participated in drawing up lists of people to be executed and houses to be set on fire in several villages, although neither the lists or the factual basis for the belief that the accused wrote them or gave the orders are in the evidence before the court.[4] The accused was then similarly alleged to have handed

---

1 See the trial testimonies of Hadjar Ramnabaja (who states that the accused and other policemen had engaged in the persecution of "Albanian citizens") at pages 19-22, and Rexhep Morina (who was beaten and insulted on the grounds of his Albanian nationality and told "you will either stay here as a citizen of Serbia or you will leave"), at page 110. Nazmije Veseli testified that "all the Albanian population, in Kamenica and the suburbs, knows that the defendant is a war criminal that did a lot of harm to the Albanian population", at page 30. Given the emotional intensity of the trial, exaggeration is to be expected, as in the latter quote.

2 See the trial testimony of Raif Ramnabaja

3 See the trial testimony of Ibrahim Sijarina, at page 59.

4 See the trial testimonies of Raif Ramnajaba, Luan Sabedinaj, Shaip Ismaijli, Borica Gjorgjeviq, Beqir Kastrati and Taip Mala, at pages 13, 133, 87, 74, 81 and 159. When a policemen was asked by Fegjerije Sabedini why her husband Mehmet Sabedinaj was being taken, the policeman replied that it was "because his name is on the list", trial testimony of Luan Sabedinaj, at page 133.

However, the accused's authorship and handling of these lists is not clear from the actual testimony. *See., e.g.,* at 13: " there was a list of people to be liquidated compiled at the organ that he was leading and maybe he himself had prepared the list." Similarly, it is a question asked by a victim's wife, at 74: "I would like to know who made the list to kill my husband and does Momcillo Trajkovic know who gave the register to kill my husband?" The authority on the list is not known, at 81: "Did you see, was there any seal, any official signature? No, they held it in front of them and I couldn't read it." *Accord,* at 87, where the witness did not see the list's signer, and 134, where the wife of a victim told the witness of a list.

The trial testimony includes the belief without any fact basis that the accused was responsible, e.g., at 133-34: "What do you think, who is responsible for all the bad things that were committed? Momcillo Trajkovic is guilty, because he knew all these people, while the Serbs who came from Serbia didn't know these people, so he is the one responsible." The court below did not explore in any detail the belief bases of the witnesses, nor the

(continued…)

these lists to the police officers under his command and ordered that the individuals listed be executed and the houses burnt.[5] Many of the Albanian citizens listed and subsequently murdered by Serbian police and paramilitary forces had participated in political, social or humanitarian activities in the region.[6] It must be noted that the accused denied these allegations as to his participation in, or knowledge of, such lists and orders.[7]

Although no witness could attest to having personal knowledge of such command or order, many witnesses claimed that the crimes were committed under the orders of the accused as the Chief of Police.[8] *E.g.,* a witness stating, albeit without any factual basis or foundation of knowledge, that "you could ask any Albanian and they all know Momcillo Trajkovic as a criminal, and he ordered these crimes."[9] It is the Opinion

---

(…continued)

contradiction with other evidence. *E.g., Cf.* with the police taking local residents to show them where the victims lived." At 87.

5 Again, specific questioning, when asked, resulted in confirmation of a belief of the witnesses that the accused was responsible as opposed to eyewitness identification of the accused being there, or giving the orders in person. *See, e.g.,* questions of PJ and answers, at 85-86, and 87-88 regarding a belief that as Chief, the accused was responsible. This latter belief is in effect the command responsibility issue addressed *supra*, but the court below cannot allow witnesses to use a trial as a philosopher's stone to transmute their own beliefs as to liability under command responsibility into the gold of evidence of direct on-the-spot ordering of criminal acts.

6 See the trial testimonies of Kadri Isufi, Nazmije Veseli and Fatmire Kastrati, at pages 34, 30 and 39.

7 See the trial testimony of Trajkovic, *e.g.,* at page 5, bottom.

8 See the trial testimonies of Nazmije Veseli, Taibe Isufi, Fatmire Kastrati, Basri Kastrati, Selver Kastrati, Selatin Ismajli, Mehmet Ismajli, Zoran Disiq, Florim Isufi, Abdullah Berisha and Xhemajl Limani, at pages 30, 28, 32, 34, 155, 92, 91, 26, 130, 17 and 24. *See* comments as to lack of specificity and factual bases in footnotes 4 and 5, *supra,* and other comments *infra* on the specific incidents.

9 See the trial testimony of Nazmije Veseli, a dental assistant. She stated first to the investigating judge that: "everything, the deportation of the Albanians from their home, and the murders were orchestrated by the defendant, Momcillo Trajkovic, who was the Chief of the department of the Internal affairs in Kamenica, at that time. No one, not the local Serbians and not even the paramilitaries could dare to act without the permission and the order of the defendant Momcillo Trajkovic. All the Albanian population, in Kamenica and suburbs, knows that the defendant is a war criminal." Yet at the beginning of his investigation statement she also admitted that: "I don't know exactly what function and duties he had during the war. I don't know also, what kind of military function had the defendant, Momcillo Trajkovic, at the same time." Inv. On 20.06.2000. During the trial, however, this witness was NOT confronted with any of these statements, and stated only "you could ask any Albanian and they all know Momcillo Trajkovic as

(continued…)

of the International Public Prosecutor that there is no reasonably credible evidence which allowed the court below to make such a finding, and thus any criminal liability for the alleged war crimes must be made based on command responsibility. The evidence is discussed *infra.*

One witness, Raif Ramnabaja, a former chairman of the Kamenica municipality and thus knowledgeable about the bureaucratic organization of the police in Kamenica, testified that someone in the accused's position would have the appropriate power to issue orders to brutalize area residents.[10] These beliefs and the necessary quanta of evidence are discussed *infra* in the context of command responsibility liability.

Details of the individual attacks follow in chronological order:

On April 1, 1999 in Kamenica, the accused allegedly ordered Dragan Stojkovic, a commander of the Kamenica police station since 1997, to burn down the house of and shoot at victim Mehmet Ramabaja, who sustained injuries from the shooting. The victim identified the shooter, and stated that the shooter admitted that he was acting on the orders of the accused.[11]

At the beginning of April 1999,[12] in Kamenica, the accused (unarmed and in civilian clothing) accompanied by a group of policemen

---

(…continued)

a criminal, and he ordered these crimes." At 29-30. There was no attempt by the court or principals to establish any factual foundation for this conclusion.

10 See the trial testimony of Raif Ramnabaja, at page 12.

11 The English translation of the Trial Transcript is in error. Para. 8 of the Mehmet Ramnbaja testimony, at 9-11, should [after this Office had it re-translated] state: "I told him not to shoot because I had not done anything to him. I had never had any problem with him. It is by his order, and I have no other choice but to do this." At 9. Note that the underlined words seem to be a quote of what the shooter said to the witness, but if so, there appears to be some other words missing.

It is the Opinion of this IPP, however, after review of the 19.07.2000 *proces verbale* testimony, in which no mention of the accused giving such an order is made, that the victim-witness is not credible, and falsely added this embellishment. The witness even stated before the investigative judge that "It was Momcillo Trajkovic, who ordered to put in fire, my house and the other facilities," albeit without giving any factual basis for his statement. Yet he never mentioned the more important supposed admission by the police officer that his shooting of the victim was at the order of the accused.

12 There is a discrepancy in the dates between the verdict facts and the trial transcript. See the trial testimonies of Fatime Shilova and Hajdar Ramnabaja, at pages 22 and 19.

(armed and in uniform),[13] personally approached the driving school of Hajdar Ramabaja to obtain a bus, and when he was told by neighbors that the owner was not there, the accused became upset and threatened, according to the previously-unsaid testimony of a witness, "you are going to see it all at night and the smoke will come out of the bus and the driving school 'Jehona.'"[14] That night, the school, the bus and a neighboring house were burnt.[15]

On April 17, 1999, in Kamenica, one of the accused's subordinates from the Kamenica police station, Stankovic Srecko, shot and injured Xhemail Limani, a member of the Democratic League of Kosovo.[16]

On April 17, 1999, in the village of Krileve, two of the accused's subordinates from the Kamenica police station, Nenad Trajkovic and [Vlado Trajkovic][Novica Simjonovic],[17] kidnapped, maltreated and tortured Haqif Demolli and other persons, and threatened them with execution. When the victims were released after several days, they were told "not to come back ever."[18]

---

13 See trial testimony of Fatime Shilova, at page 22.

14 See trial testimony of Fatime Shilova, at page 22-23. However, the defense brought out in the investigative hearing, the witness did not mention either the threat, or the keys being asked for, in his testimony before the investigative judge on 18.07.2000; rather, the *proces verbal* shows the witness stated only that the accused said: "They told me that they needed to have some of the vehicles, and the bus, which was parked, in front of the driving school." At 23.

I very much disagree with the PJ's statement at 23 that "…what we are interested in is the event of April 1999 and what was said during the investigation is less important," because often the what is stated, and more significantly, not stated, to the investigating judge is as important, if not more, than what is stated at the trial. In the trial, with one's neighbors and other interested parties listening, the urge to exaggerate or add detail or further inculpating facts may, and sometimes does, occur. This is my experience in many trials in Kosovo, Bosnia, Pakistan, & US.

15 See trial testimony of Hajdar Ramnabaja, at page 19.

16 The witness believes that the accused ordered the attack, based only upon the fact of the accused's position as "chief of police" and on his knowledge of the witness's political involvement with the Democratic League of Kosovo. The accused admitted to knowing the witness and to knowing about the witness's previous interrogation for such political involvement and subsequent sentence in Kamenica. See trial testimony of Xhemail Limani, at pages 24-25.

17 There is a discrepancy in individual perpetrators identified by the witness between the verdict and the trial testimony . See the verdict and the trial testimony of Haqif Demolli at pages 6 and 26. The accused ,however, was not among the perpetrators.

18 See the trial testimony of Haqif Demolli, at page 25.

On April 18, 1999, the accused allegedly gave orders for and participated in the attacks undertaken by military, paramilitary and police forces on the villages of Strezovc,[19] Leshtar,[20] Rahovice[21] and Krileve.[22]

---

[19] See the trial testimony of Zoron Disic, at page 126. The witness attests to the burning of houses and killing of villagers in Strezovc by uniformed paramilitaries and to the fact that Nenad Trajkovic and Sveta Peric threatened to kill him if he tried to protect the villagers, saying that "everyone who hangs out with Albanians is of the KLA". He also states that the Serb responsible for the killings of K-Albanians in Kamenica was "Branimir Filic. He gave the orders to commit all these crimes and he was the mayor of the municipality." *Id.* Thus this witness does not provide any link to the accused. Any criminal liability of the accused must therefore stem from a command responsibility theory, discussed *infra.*

[20] See trial testimonies of Bahtije Sinani and Bukurije Sinani, at pages 43-45 and 45-47. Here, as in many other statements of witnesses, neither witness mentions the accused, but his giving the orders is assumed by the witnesses because the police were involved. Again it can also be seen that the examinations by court and parties do not attempt to determine the details necessary to distinguish rumor and speculation from factual bases. *E.g.,* at 47: "a meeting took place in Kamenica and it was decided to burn Strezovc. Our neighbors who were sure this meeting took place told us." Also nowhere is the difference between paramilitary, military and police uniforms explored in depth.

It must be noted that Ms. Sinani is not asked and does not state the difference between police and paramilitary uniforms, and admitted not knowing who shot her: "I could not distinguish them since I had no time to look backwards because we were running." This is critical as even command responsibility liability could not be proven in this case. Mr. Sinani gave contradictory information on those involved:

> "I think <u>that paramilitaries have committed all these crimes</u>.
> Q. Who was responsible for all what happened against Albanian people ?
> A. It was Slobodan Milosevic with all his accomplices.
> Q. Do you know anyone from the police ??
> A. There was a guy called Nenad and another one called Bojan. I do not know their last names. Both of them were policemen….".

Mr. Sinani, however, was clear that <u>paramilitaries</u> murdered his father in the yard, and this is consistent with his testimony to the investigative judge.

[21] See the trial testimonies of Florim Isufi, Taibe Isufi, Nazmije Veseli, Kadri Isufi, Fatmire Kastrati, Basri Kastrati, at pages 129, 28, 30, 34, 39 and 40. The ambiguities left in these short witness narrations and conclusory opinions render impossible any attempt to find direct evidence of the accused's participation or ordering. *E.g.,* Nazmije Veseli states that both police and soldiers are involved in the deaths of 3 victims described in the verdict under "18 April 1999, creation of panic and terror and eviction of civilian population…and murder of … Arsim Isufi, Shemsi Isufi, and Ramadan Kastrati." Yet the only mention of the accused is "…they took Ramadan Kastrati and he was executed, Momcillo Trajkovic took him. Momcillo Trajkovic's two sons were also dressed as policemen." At 29. It is thus unclear whether the accused was present or whether this is an assumption or a way of saying the police [embodied by their commander] took him. No clarifying questions are asked. She also asserts without any basis, when asked, "Do you know Momcillo Trajkovic and how do you know him?…Yes, you could ask any Albanian and they all know Momcillo Trajkovic as a criminal, and he ordered these crimes." At 30. This assertion, made by many other witnesses, cannot be considered in itself as serious evidence with which to convict, unless a factual basis is shown.

Kadri Isufi at 34 gives a specific act committed by the accused, "he wounded Mevlud Isufi from the apartment he fired from," but this fact is never explored further in the record or with this witness." When asked his opinion of the accused he gave a statement of the crimes of the

(continued…)

However, the accused was not linked directly to either orders or participation except through the stated but otherwise factually unsupported beliefs of the witnesses that the accused is responsible.[23] The attackers opened fire with automatic and other firearms, aiming to create panic and terror among the unarmed civilian population by evicting people from their houses and expelling them from the villages. One witness estimates that 100 Albanian families were expelled from their homes on April 18, 1999.[24] Residents of the villages were forcibly expelled and displaced from their homes and their property was looted, burned and destroyed.[25] Residents of Rahovice were forced to proceed in a group towards another village and were terrorized along the way by the Serbian paramilitary troops, until they were stopped and maltreated

---

(…continued)

"police" in general. Basri Kastrati at 39 gives a factual account of an abduction and beating he witnessed at the beginning by police who arrived driving a civilian vehicle. As occurred in this trial on many occasions, the witness was asked his opinion of the accused, and answered, "When two persons from our village were murdered, it was done by his order, it means, by order of Momcillo Trajkovic." No further questions were asked by the court or parties to examine the possible factual base of such an opinion. Florim Isufi at 129-130 gave an account of his brother Arsim Isufi being killed by unknown persons with police uniform uppers and camouflage military uniform lowers, but nonetheless has the further-unexamined opinion that "They took him and then killed him with an automatic gun. The policemen I recognized [who came] were Zoran Vasic and Nenad Trajkovic. My brother's murder was done by order of Momcillo Trajkovic, aka Moma." At 130. However, his short narrative contradicts itself on the same page when he also states that the police shot his brother with a pistol.

Overall, the testimony does not support any direct ordering or participation by the accused in the village of Rahovice, and the only criminal liability of the accused which could be found must accrue from command responsibility.

22 See the trial testimony of Zeqir Demolli, at page 50. He states clearly that a person in a camouflage uniform, a military and not a police officer, shot him. The verdict's statement that the accused "is guilty of the following crimes…on 18 April 1999 in the village Krileve, injuries with firearms of Zeqir Demolli….reason: the action taken on the same day, particularly by police forces," is in contradiction to this testimony referring to 20 April 1999 by the victim himself.

23 See the previous footnotes. However, the witnesses could be characterized as recognizing the liability based on the accused role as the Police Chief, hence liability discussed *infra* based on command responsibility. This comment does not take into account the overheard telephone command in the case of Ismail Ismaili, discussed *infra.*

24 See the trial testimony of Raif Ramnabaja, at page 13.

25 See the trial testimonies of Taibe Isufi, Nazmije Veseli and Kadri Isufi, at pages 28, 29 and 32.

again in the village of Srezofc.[26] During the course of these events, the attackers singled out, maltreated and murdered Shemsi Isufi and Ramadan Kastrati,[27] both politically active members of the Democratic League of Kosovo, with a history of interrogation by the Kamenica police for their involvement in humanitarian activities.[28] Ahmet Mehmeti[29]and Arsim Isufi[30] were also murdered in Rahovice that day. On the same day, military-police forces attacked the surrounding villages of Krileve and Leshtar with firearms and injured Zeqir Demolli, Avdyl Demolli and Bahtije Sinani.[31]

On April 19, 1999, military-police forces commanded by the accused planned an attack against the civilian population of the village of Petrovc,[32] evicting civilians by force, burning their houses and causing the disappearances (not the murder, as stated in the indictment) of Murtez Sherifi and Fadil Sherifi.

---

26 See the witness statement of Kadri Isufi, at page 32. Although some of the police and paramilitary attackers were masked, others were not, notably those from Kamenica, and the witness recognized Zhivojin Filic (aka "Przha") as one of those who took part in the attacks. Another witness, Nazmije Veseli, also identified other local Serbs from Kamenica and surrounding villages, wearing military uniforms and carrying firearms, as taking part in the attacks on Albanian citizens in the villages of Rahovac, Leshtar and Stesovc.

27 See trial testimony of Shaban Mustafa at page 147, who was an eyewitness to the murder of Ramadan Kastrati.

28 See the trial testimonies of Kadri Isufi, Nazmije Veseli, Fatmire Kastrati and Selver Kastrati, at pages 34, 30, 30 and 153.

29 See the trial testimony of Rexhep Mehmeti, at page 134.

30 See the trial testimonies of Florim Isufi, at page 129, also identifying Zoran Vasic and Nenad Trajkovic as taking part in the attack.

31 See the trial testimonies of Avdyl Demolli, Zeqir Demolli and Bahtije Sinani, at pages 48, 50 and 43.

32 See trial testimony of Momcillo Trajkovic at pages 2-8. Accused states that "his department had been regularly reporting population displacements and had received orders from the local police to not let people leave but make them go back to their homes. The accused further states that where the residents of Petrovic were heading for Gjilan the accused's department had to ensure that they reached Gjilan safely and were not harassed.

On May 4, 1999 policemen (in particular, five policemen from Kamenica identified by the victim) caused injuries to victim Arif Kraniqi,[33] a resident of the village of Kamenica.

There is one witness who testified that on May 11, 1999, the accused directed and commanded at least one planned and organized murder -- the police murder of her husband, Ismajl Ismajli, a physician and humanitarian activist. However, this International Public Prosecutor reasonably questions the credibility of her assertion that she overheard a voice she recognized as the accused's giving the police orders over the phone in their home, and the IPP suggests that the court below did not and could not rely upon it to find that the accused directly ordered the murder.[34]

Regardless of the lack of evidence of direct control or orders by the accused, the murders of May 11 were intended and executed by what appears to be police, military and possibly paramilitary personnel,

---

[33] See trial testimony of Arif Krasniqi at page 63. Krasniqi testified that on May 2, 1999 he witnessed the police terrorize his family and neighbors.

[34] See trial testimony of Zjavere Ismaili at pages 85-86. There is no question that she believed the accused responsible: "All the crimes that were done in this municipality, were done by the order of Momcillo Trajkovic." However, it seems she only claims she heard his voice, based upon the trial testimony: [Question:] "The day when your husband got deprived from life, was Momcillo Trajkovic present there? [Answer:] Yes, Moma himself was there, together with his police." However, she also stated, in contradiction, that " I heard his voice; when the policeman had a phone in his hand; he didn't talk to me but the voice was of Moma [the accused] and the policeman was a stranger." She also answered the PJ's question as follows: "[Question:] Did you see personally Moma that day? [Answer:] No, I didn't see him, but he only talked on the phone, there was another policeman….".

Unfortunately, neither the panel nor any principal examined the witness by asking her when was the last time she heard the accused's voice or how close she was to the telephone, or if the receiver was pressed up to the police officer's ear. The only question relevant to this issue was asked by the defense counsel: "I would like to know where did the lady meet Momcillo Trajkovic and where did they see and talk to each other? Do you know Momcillo Trajkovic? [Answer] No, I know only his name, while my husband knew him very well; when my husband told me those words and 10 days earlier he was circling around the house; and when my husband told me I saw him but I didn't know him because I didn't have any business with him." The emphasized answers make it unlikely that the court below relied upon this witness' testimony, neither would it be reasonable, to find that the accused gave direct orders and controlled the murder over the phone.

Likewise, the potential of developing the issue of whether (through the victim's statements made to his wife) it could be proven convincingly that the accused circumstantially planned the

(continued…)

included those of Ramadan Latifaj,[35] Mehmet Sabedinaj,[36] Ismail Ismaili,[37] Nevzat Kryeziu[38] and Asllan Thaqi[39] in the villages of Hoghost,[40] Kopernice, Shispanice, Kranidell, Upper Karaqeve, Lower Karaqeve, Rogocice,[41] Hodonovc, Topanice and Koretin. The attackers had in hand lists[42] which had been prepared in advance of the people by name and

(…continued)

murder through following the victim never bore fruit through further examination, and also was not referred to in the reasoning of the court, and thus cannot be considered to have been proven.

35 See trial testimony of Borica Gjorgjevic at page 73. Witness testified that she was confronted and questioned by the police at home and claims she was shown a list of names on which Ramadan Latifi, her husband, was listed. On the same day witness states that her house was set on fire and her husband was killed.

36 See trial testimonies of Fegjerije Sabedini and Luan Sabedinaj at pages 13 and 133, with the former being the wife of Mehmet Sabedinaj and the latter his son.

37 See trial testimony of Idrizi Ahmet Hasani at page 149-151, who was eyewitness to the murder, and said one year ago the victim had been questioned by the accused. See also trial testimony of Zjavere Ismaili at page 84, Ismail Ismaili's wife who "retrieved [her] husband's body" just hours after he had been taken from their home by the police. Witness testified that her husband had been constantly harassed by the police and that her husband had mentioned to her that the accused had "been watching him" for a long time before May 11, 1999.

38 See trial testimonies of Bejtije Kryeziu, Musa Kryeziu,Tevide Kryeziu, Bajram Kryeziu at pages 93, 94, 95 and 96 as to the abduction and murder of Nezvat Kryeziu. Witness Musa Kryeziu saw police beat Nezvat and then break his leg with a pickaxe before dragging him to a nearby field and killing him.

39 See trial testimony of Hazir Thaqi at page 69. Thaqi testified that police, led by Dragan Sllavkovic, seriously beat both him and his son, Asllan Thaqi, before taking Asllan away. While trying to find his son, Hazir claims that he spoke with Serba Aksic who told Hazir that the accused and Dragan Sllavkovic gave him orders as to how to deal with Asllan Thaqi (presumably to kill Asllan Thaqi).

40 See trial testimonies of Hajrije Shurdhani and Shefki Berisha, at pages 108 and 109, who state that the police attacked the car in which they were driving out of Hogosht village, injuring them both. Trial testimony of Luan Sabedinaj at page 133, asserts that the Serb police set fire to the houses in Hogosht village, with the first house set on fire being that of Ramadan Latifi.

41 See trial testimony of Selatin Ismaili at page 91.

42 Several of the murder victims' names were on a list that police had in their possession while conducting searches and interrogations on May 11, 1999. See trial testimonies of Borica Giorgieviq, Ramadan Biqku, Beqir Kastrati, Shaip Ismaili, Mehmet Ismaili and Luan Sabedinaj at pages 73, 79, 81, 87, 90 and 133, respectively, and witness statement of Bekim Fazliu at page 54. In particular, trial testimony of Shaip Ismaili at page 79 testifies as to the names which they read from the list. Testimony of Luan Sabedinaj states that Luan heard the wife of Ramadan Latifi ask a policeman why her husband was being taken with the policeman responding "because his name is on the list."

surname who had participated in political,[43] social[44] and humanitarian activities.[45]

On May 17, 1999, policemen from Kamenica, acting on the orders of "someone," kidnapped Rexhep Morina from his home in Topanice, beat him up, and maltreated and tortured him inside the police station.[46]

B. Individual and Command Responsibility

During the trial, the accused denied any involvement in the crimes committed and claimed that his functions as "Chief" were only administrative in nature and that he had no control over uniformed police. However, the witnesses at the trial testified that the competencies of the accused were not limited to administrative matters during the time of the war, as alleged by the accused, and that this fact was known by the people of the Kamenica area. One witness, Enver Ramizi, a former law enforcement officer in Gjilan, testified that the Chief of Police heads and commands the police forces, that his duties increase during a state of war, that he has the authority to delegate to his subordinates the

---

43 See trial testimonies of Hazir Thaqi and Fetije Thaqi at pages 70 and 131 respectively. Examples of political involvement include membership of the LDK (Democratic League of Kosovo), provision of aid to the Kosovo Liberation Army? ("KLA") and other refugee organizations, see trial testimony as to deceased persons membership of the following: Hazir Thaqi (LDK), Ramadan Biqku (KLA) and Rexhep Morina (LDK) at pages 70, 78 and 110. Murder victims involved in political, social and humanitarian groups include Ramadan Kastrati (LDK), Asllan Thaqi (LDK), Nezvat Kryeziu (humanitarian aid).

44 See trial testimony of Zjaver Ismaili at pages 84-85. Zjaver's husband was a physician who had been giving aid to refugees and "our army" (it is assumed this refers to the KLA).

45 See trial testimony of Bajram Kryeziu, at pages 96-100, who was engaged in humanitarian activities and had been interrogated by the accused on several occasions.

46 See trial testimony of Rexhep Morina at page 110-112 who testifies that the commander of the police station in Kamenica, Sllavkovic Dragan, interrogated him about his connections with the LDK and said that "[Rexhep] will tell us everything or we will execute him." The accused was not mentioned or present at that police interrogation, and was not seen on that day by the victim. The witness also stated, "They said they were acting on someone's orders. Nobody does something like this on his own initiative." The victim stated he gave a statement in 1997 to the accused, and then asserted without detail that "I had informative talks with Momcillo Trajkovic six times whereas I had two with someone else. He physically abused me five times. [Question:] What did he ask you during these talks? [Answer:] The reason for questioning me was my participation in different meetings and on the occasion when I was elected the president of LDK, when he told me 'why did they elect you and not someone else.'"

execution of such duties and that his orders would usually be executed by the police commander. The accused was the Chief of Police and, in such capacity, issued orders at the Kamenica police station during the war. The commander, the police commander and operatives in the region reported regularly to the accused. The witness also stated that "no villages could be surrounded and blocked without [the accused's] permission" and "none of the lists could have been formed without orders from [the accused]".[47] These statements of witness' Ramizi's beliefs must be evaluated, however, in light of the witness' history after being forced out of the police in 1990: Ramizi's testimony that the accused "committed the unseen genocide that we were arrested in 1994," that the accused "used electroshock on my genitals," subjected him to "inhuman beatings" going on and off over 60+ hours, "torture in 1984 [*sic* – likely 1994] lasting 3 months," "broke 14 of my teeth," and "I still haven't decided to return to my place of employment, from which the accused removed me as a terrorist."[48] The Verdict reasoning does not discuss any of these specifics.

Moreover, a fact which may be used to infer control or at least knowledge is that when people were looking for news of their missing relatives, they would go directly to the accused, to his office and sometimes to his private house.[49]

Furthermore, the verdict states that according to several testimonies, the accused acted personally in preparation or execution of

---

47 See trial testimony of Enver Ramizi, a former law enforcement officer in Gjilan, on the duties of the chief agency and police, at page 167 *et seq*.

48 See testimony at 165. The witness' experience in the police department ended in 1990, and his knowledge of the accused's authority under war time conditions is therefore not necessarily well informed, and there are no foundational facts elicited regarding how he got to know such facts. His patent bias against the accused must also be factored into the equation.

49 In particular Hazir Thaqi about the disappearance of Asllan Thaqi, Naime Keka and the brothers of Ramadan Kastrati about the disappearance of the latter, Zenan Jerliu about the disappearance of his brother Emin Jerliu according to the testimony of Haqif Lerliu, Idriz Bajrami about the disappearance of his son.

some of the crimes, although these crimes are not qualified in the verdict or punished with the sentence. The verdict discusses only two.

First, witness Ramadan Morina stated that on March 26 and 27, 1999, several policemen from Kamenica came to his house to take his buses and his Mercedes car, which he believes were on orders of the accused's order, which the accused explained as legitimate paperwork.[50] The Verdict states his Mercedes was taken by the accused himself, while the trial testimony is:

> "I have evidence that Momcillo Trajkovic took my car that day, and two other buses the next day. [When asked the question:] Who took your car? [he clarified:] Bugari of Piroti took it and Momcillo Trajkovic knows this since he was under his commands, and I also have a document signed by Momcillo Trajkovic regarding the taking away of the car. [The Court then stated] In front of the investigating judge you said that it was someone else and not Momcillo Trajkovic [which the witness denied]."

The witness added that he was interrogated and slapped by the accused, who told him in Serbian language: "we should kill all the Albanians."[51] However, the witness used two different dates for the maltreatment at the police station: March 26, and a page later, April 27, 1999.[52]

Second, witness Taip Mala stated that on May 9, 1999, he saw and heard the accused on the road near Bujanovc, in a red Golf car, talking in Serbian with a forester Ameti and a Krana of "Kolloleq" asking

---

50 See the trial testimony of Ramadan Morina at 140-141. See the trial testimony of the accused, following it at 141-142.

51 See the trial testimony of Ramadan Morina, at page 139-141.

52 *Id.* The witness also makes a reference to severe kidney damage, but does not specify the accused as the one who inflicted the injury, or being present, and also referred to an "Uqa" inflicting the earlier punishment upon him. This may establish bias by the accused against Albanians if believed, but does not in itself establish any of the qualified crimes, neither does it establish command responsibility for other crimes.

"where are you the forester?"[53] This is inexplicably and erroneously referred to in the verdict reasoning as "he saw Momcillo Trajkovic on 09 May 1999 on the road close to Bujanovc, in a black [not red as in the verdict reasoning] car "Golf', talking in Serbian language with policemen Ahmet Ameti and Krana about preparation of a planned action." The witness went on to state that "Once the military withdrew, it was found this list with the names of people that were supposed to be executed [names omitted]. That list that had written names, Serbian military didn't know us and they didn't know who I was personally, but that was done by the order of M. Trajkovic or his assistants such is Black Rada." No factual basis for this assumption is made, nor is there any acknowledgement of the witness' animosity toward the accused or his prison terms in the 1980s.[54] The verdict reasoning went even further, referring to the fact that "he found a list…", when the witness did not give any such specifics as to the list. Nor is the list connected in any way to the accused except for speculation.

The court below concluded that these two factual personal involvements, when combined with the legal competency of his office, discussed *infra,* were "different elements [which] constituted the proof that the accused was "personally responsible for the criminal acts committed in the Kamenica area against the civilian population but only for those organized actions and not for the isolated ones." In the Opinion of the International Public Prosecutor, however, this can only be

---

53 See the trial testimony of Taip Mala, at page 159-161.

54 *Id.* This statement contains a patent assumption, without any factual basis other then speculation by the witness as who ordered the list, and also does not state who found or authenticated this "list," or where it was found, or where it was at the time of the trial, or what happened to it. More importantly, the testimony of the witness lists numerous reasons for bias against the accused, including prison sentences in 1982-1984, 1985-1987, his sister being sentenced to 5 years, all blamed in part or whole on the accused, maltreatment in prison and claimed beating by the accused, and allegation that the accused threw his brother out a window. None of this is addressed by the court, and goes to the issue of good faith belief regarding his testimony. Moreover, no questions were asked as to how the witness managed to stop and overhear such a conversation and not be noticed, how close he was to the accused, and why he recalls it was 1300 on that day.

based upon a finding of command responsibility liability for war crimes, and is not present in the attempted murder and weapons violations.

C. Conclusion

Based on the above facts accepted in the verdict of the District Court in Gjilan, the accused was declared guilty firstly of war crimes and the court then proceeded to qualify those crimes as crimes against humanity, defined as "crimes perpetrated during the war through systematic and widespread attacks against the civilian population, from March 24, 1999 until the day of the arrival of the international troops in Kosovo, in accordance with Article 142 of the Criminal Law of Yugoslavia."

II. War Crimes Under Yugoslav and International Law

A. Yugoslav Criminal Code

Article 142 of the Yugoslav Criminal Code also criminalizes actions similar to those defined in international law as violations of the law of war, and contains the following elements:

> [1] Whoever in violation of rules of international law effective at time of war, armed conflict or occupation,
>
> [2] orders that civilian population be subject to killings, torture, inhuman treatment, … immense suffering or violation of bodily integrity or health; dislocation or displacement …application of measures of intimidation or terror, taking hostages… unlawful bringing in concentration camps and other illegal arrests and detentions; deprivation of rights of fair and impartial trial…property confiscation, pillaging, illegal and self-willed destruction and stealing on a large scale of a property not justified by military needs…
>
> [3] or who commits one of the foregoing acts,

shall be punished by imprisonment for not less than five years or by the death penalty.[55]

Both the Commentary to the Yugoslav Penal Code and Article 142 itself indicate that the Article only prohibits acts that violate international law (including international humanitarian law).[56] The Commentary further specifies that the prohibitions in Article 142 are drawn from the 1899 and 1907 Hague Conventions with Respect to the Laws and Customs of War on Land,[57] the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[58] and the 1977 protocols thereto.[59] Therefore, an analysis of whether Trajkovic committed war crimes under international law, especially that which refers to the same terms as used in Article 142, should constitute persuasive authority on the issue of whether they violated Article 142.

B. Hague and Geneva Conventions

The most authoritative codifications of the law of war appear in the 1899 and 1907 Hague Conventions, the four Geneva Conventions of 1949, and Protocols I and II, many provisions of which have been accepted as stating customary international law.[60] All proscribe actions similar to those listed in Article 142 of the Yugoslav Penal Code.

---

55 Yugoslav Penal Code, art. 142.

56 *See id.*; Bacic, Franjo, et al., Commentary on the Criminal Law of the Federal Republic of Yugoslavia, § 3 (5th ed. 1995) [hereinafter Commentary].

57 *See* Commentary at § 1; Convention With Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803 [hereinafter 1899 Hague Convention]; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention].

58 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

59 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 [hereinafter Protocol II].

60 *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 35 (3 May 1993).

The law of war was first codified in the 1899 and 1907 Hague Conventions. The Hague Conventions protect the life, liberty, and property of civilians, though not in the same terms as Article 142.

The four Geneva Conventions of 1949 are widely regarded as the cornerstone of the law of war. Most relevant here is Geneva Convention IV, the Geneva Convention relative to the Protection of Civilian Persons in Time of War. Prohibitions enumerated in Geneva Convention IV apply only during armed conflict; different prohibitions to international armed conflict and armed conflict "not of an international character."[61] Common Article 2[62] defines international armed conflict as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[63] Protocol I expands the definition of international armed conflict to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[64]

Article 146 of Geneva Convention IV requires states party to the Convention to criminalize the commission and the ordering of grave breaches of the Convention during international armed conflict. Article 147 defines "grave breaches" as

> those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment…, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person…or willfully depriving a protected person of the rights of fair and regular trial

---

61 Geneva Convention IV, art. 3.

62 Common Articles are articles common to all four Geneva Conventions.

63 Geneva Convention IV, art. 2.

64 Protocol I, art. 1(4).

> prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[65]

Article 142 of the Yugoslav Penal Code appears most directly derived from this provision of international law.

During non-international armed conflict, the following narrower set of prohibitions applies pursuant to Article 3 of Genocide Convention IV:

> Persons taking no active part in the hostilities…shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited . . . with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> . . .
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment…[66].

To this minimum, Protocol II adds the following relevant protections:

> Article 4
>
> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices.
>
> 2. [T]he following acts against the persons referred to in paragraph 1 are and shall remain prohibited . . . :
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;…
>
> . . .

---

65 Geneva Convention IV, art. 147.

66 *Id.*, art. 3.

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;

. . .

(g) pillage;

(h) threats to commit any or the foregoing acts.

Article 13

. . .

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 17

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.[67]

The protections applicable in non-international conflict are thus more limited than those obtaining in international conflict. The provisions cited above prohibit willful killing of civilians in both kinds of armed conflict but protect property rights much less in non-international conflicts. According to the Commentary, this dichotomy is incorporated in Article 142 implicitly, via the initial reference to "violation of rules of international law effective at time of war, armed conflict or occupation."[68] Thus, article

---

[67] Protocol II, arts. 4, 13, 17.

[68] Yugoslav Penal Code, art. 142. Article 142 does not recognize the dichotomy explicitly, but the Commentary does:

> War crime against civilian population can also be performed in the conditions of civil war, i.e. when it is a non-international armed conflict. In that case, however, according to [Geneva Convention IV and Protocol II], the regulations of international war law are applied in limited scope, i.e. the ban of only some of the activities stated in this article is stipulated. The ban includes the attacks against the life and physical integrity, in

(continued…)

142 of the Yugoslav Penal Code appears to prohibit essentially the same kinds of acts, in the same kinds of armed conflicts, as Geneva Convention IV and the two Protocols.

C. Statutes of International Criminal Tribunals

The Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY")[69] and the Statute of the International Criminal Tribunal for Rwanda ("ICTR")[70] also define violations of the law of war. In theory, the Statutes are less authoritative sources of international law than the Hague and Geneva Conventions. The Statutes are less widely ratified and less clearly accepted as representing customary international law. Also, the primary purpose of each Statute is to define a tribunal's jurisdiction, not necessarily to codify international humanitarian law.

In practice, the Statutes' definitions of war crimes should accurately reflect international law, as they incorporate it by reference. Article 2 of the ICTY Statute confers on the ICTY

> 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

---

(…continued)

> particular murder in all forms, injuries, torture and causing suffering, inhumane treatment, humiliating and diminishing treatment [sic] taking hostages, deprivation of the right to a correct and impartial trial, rape, forced prostitution, etc. Other activities from this Article which are not included in the mentioned convention and the supplementary protocol, could not, in case of a civil war, be qualified as a war crime, but, probably, as another criminal act from the federal or republic legislation. It is necessary to mention here that, according to [Protocol I], also those armed conflicts in which the peoples are fighting against colonial domination and foreign occupation and against racist regimes, using the right of the people to self-determination are considered international armed conflict (and not civil war). The stated regulations or the application of the regulations of international war law to internal conflicts refer only to such armed conflicts, which, in their scope and character, can be compared to a war, and they do not refer to the cases of internal unrests, isolated rebellions, sabotage - (diverzantske) actions, and other occasional (sporadican) acts of violence which represent a violation of the regulations of the international law.

Commentary at § 3.

69 Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 4, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

70 Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., art. 2, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

> or property protected under the provisions of the relevant Geneva Convention:
>
> (a) willful killing;
> (b) torture or inhuman treatment…;
> (c) willfully 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;. …
> (g) unlawful deportation or transfer or unlawful confinement of a civilian. . . .[71]

In addition, the ICTY has interpreted Article 3 of its Statute, drawn from the 1907 Hague Convention,[72] as conferring the power to prosecute violations of all of the prohibitions applicable to non-international armed conflicts under Geneva Convention IV and Protocol II.[73] While the ICTR Statute does not by its terms extend to grave breaches of the Geneva Conventions, it does include the prohibitions of Geneva Convention IV and Protocol II applicable to non-international conflicts.[74]

---

[71] ICTY Statute, art. 2.

[72] *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 41 (3 May 1993).

[73] *See Prosecutor v. Tadic*, *Decision of Defence Motion for Interlocutory Appeal on Jurisdiction*, para. 87 (Appeals Chamber Oct. 2, 1995) ("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 . . . "); *see also* Statement of Mrs. Madeline Albright to the Security Council in Response to Resolution 827, S/PV.3217, at 15 (25 May 1993)). Article 3 confers on the ICTY

> the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> . . .
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or willful 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.

ICTY Statute, art. 3.

[74] The ICTR Statute confers on the ICTR

> the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(continued…)

Thus, regardless of the status of the ICTY and ICTR Statutes as sources of international humanitarian law in themselves, the ICTY's jurisdiction extends, either explicitly or by interpretation, to war crimes as defined in authoritative international instruments; the ICTR's jurisdiction extends explicitly to non-international war crimes similarly defined. The Tribunals' jurisprudence therefore provides the most authoritative interpretations and applications of the international definition of war crimes.

D. Elements of War Crimes

The cited provisions of Geneva Convention IV establish that, in general, a person commits a crime of war only if:

(1) during an armed conflict, whether or not international

(2) he commits a prohibited act against a protected person or population.

As discussed in Section III.C below, ICTY jurisprudence makes explicit the third necessary element, a nexus between the armed conflict and the prohibited act.

III. Trajkovic's Culpability Under International Law

A. Armed Conflict

The existence of an armed conflict is the defining element of any war crime. The court must establish that the underlying crime was committed during the prevalence of an armed conflict. The existence of an armed conflict regarding this case has two separate issues:

(…continued)

> a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; . . .
> e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> f) Pillage….
> h) Threats to commit any of the foregoing acts.

ICTR Statute, art. 3.

(1) whether such an armed conflict could be shown based on the law, and the facts and acts notorious or provable in Kosovo, and if so,

(2) whether such proof of an armed conflict was done in this case.

The verdict reasoning contains only one statement of fact on this issue, that "the state of war was declared by the Yugoslav government on 24 March 1999." There are no other facts on this issue mentioned. Therefore, it is the Opinion of the IPPK that while it could have been proven, it was not in fact proven or established in this case, under the applicable criminal procedure.

First, the law and possible proof. The Appeals Chamber of the International Criminal Tribunal of Yugoslavia in Prosecutor v. Dusko Tadic a/k/a/ "Dule",[75] provided the following test for the existence of an armed conflict:

> 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. 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 the actual combat takes place there.

This test has been consistently used by subsequent decisions of the International Criminal Tribunals of Yugoslavia ("ICTY") and Rwanda ("ICTR").[76]

---

[75] Prosecutor v. Dusko Tadic a/k/a/ "Dule", ITCY, IT-94-1, October 2, 1995.

[76] For example, in Prosecutor v. Dragoljub Kunarac, Radimir Kovac and Zoran Vukovic, ITCY, IT-96-23, February 22, 2001, the Trial Chamber adopted the above-cited definition of an armed conflict in Tadic, in emphasizing the necessity for the existence of an armed conflict in any war crime prosecution.

Although the ICTY has not expressly held that the situation in Kosovo in early 1999 amounted to an armed conflict sufficient to invoke the jurisdiction of the court, such a finding is inherent in its ruling upholding the indictment of Slobodan Milosevic for, *inter alia*, the commission of war crimes during the conflict in Kosovo.[77] In reaching its decision, the Court specifically referenced the fact that a declaration of a state of imminent threat of war was proclaimed on March 23, 1999 and a state of war was declared the next day.

The existence of an armed conflict between the forces of the Federal Republic of Yugoslavia ("FRY") and the Kosovo Liberation Army ("KLA") between March and June 1999 is could have been evidenced not only by the hostilities that took place during that time, but also by the reactions of states and international organizations and the commentaries of international observers. In the months leading up to this time period, the Security Council issued a series of resolutions condemning the increasingly grave situation in Kosovo.[78] Moreover, it is not necessary to

---

[77] Prosecutor v. Slobodan Milosevic, ICTY, May 24, 1999.

[78] The first resolution condemned "… all acts of violence by any party, as well as terrorism in pursuit of political goals by any group or individual, and all external support for such activities in Kosovo, including the supply of arms and training for terrorist activities in Kosovo ..."). United Nations Security Council Resolution. No. 1203, October 24, 1998.

A second resolution condemned "… the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training."). United Nations Security Council Resolution. No. 1160, March 31, 1998.

In another press release, the Security Council strongly condemns massacre of Kosovo Albanians in Southern Kosovo. United Nations Security Council Press Release No. 6628, January 19, 1999.

Indeed, one commentator from the Legal Advisory Section of the Office of the Prosecutor of the ICTY concluded that "the resolutions adopted by the Security Council before NATO's Operation Allied Force . . . can be seen as authoritative endorsements of the Prosecutor's view that the conflict in Kosovo reached the requisite level of intensity to be considered an armed conflict for the purposes of the 1949 Geneva Conventions." Sonja Boelaert-Suominen, The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict, International Review of the Red Cross No. 837, 217-252, March 31, 2000.[78]

prove that the clashes between the parties were occurring at the specific place and time of the alleged offenses.[79]

None of these are mentioned or relied upon by the court below. Neither does the court attempt to rely upon any of the acts of violence described by the witnesses before it to find the state of armed conflict. It seems the court either did not consider it relevant to make a finding on this issue of whether there was an armed conflict, or it simply assumed an armed conflict without stating its finding before the parties or in the verdict. Nor does the court give an end date to the conflict.

Even if the existence of an armed conflict is established, it is necessary to determine whether it was of an international or non-international character. This distinction is pertinent because it determines which prohibitions would apply under Geneva Convention IV.

1. International Armed Conflict

Article 2 of the ICTY Statute classifies certain war crimes as "grave breaches" of the Geneva Conventions when committed during an international armed conflict. These war crimes include, *inter alia*, willful killing, torture, as well as extensive destruction of property. Because prohibitions on conduct in non-international armed conflict are much more limited than under international armed conduct under international law, it is important to establish not only the existence, but also the international or non-international nature of the conflict. Although there is little question that an armed conflict could be proven to exist in Kosovo in the Spring of 1999 when the alleged crimes took place, it is less clear whether the conflict would be considered "international" or "non-international" in character. This inquiry will determine whether Trajkovic's murder of certain victims and destruction and arson of their property could constitute

---

79 In order to satisfy the "armed conflict" requirement, it is not necessary to show that substantial clashes between the parties to the conflict were occurring at the specific place and time of the alleged offenses. The prosecution must prove merely that the "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. Tadic, *supra*

an underlying offense since "willful killing" (Article 2 (a)), "willfully causing great suffering or serious injury to body or health" (Article 2 (b)), "appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Article 2 (d)), are all considered to be "grave breaches" of the Geneva Conventions where an international conflict is involved, but are not enumerated as an offense in the context of non-international conflicts under Article 3 of the same Statute. A similar distinction is drawn in the Commentary to Article 142 of the Yugoslav Penal Code.

The General Introduction to the Commentary on Protocol II ("General Introduction") distinguishes international and non-international armed conflict as follows:

> a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign states, but the government of a single State in conflict with one or more armed factions within its territory.[80]

NATO air strikes against FRY and Yugoslav targets in Kosovo began on March 24, 1999 and ended in the first week of June. Based upon the fact of NATO involvement in the Kosovo conflict against the FRY, which had the effect of supporting the goals of the KLA (albeit not in a mutually-agreed coordinated manner) it is arguable that at least this period of the conflict could have be characterized as "international". However, it could also be argued that there were two conflicts, international being FRY-NATO, and non-international being FRY-KLA, as neither NATO or KLA was under the control or was patently coordinating its actions with the other, and thus two standards, one more lenient,

---

[80] Commentary on Protocol II, General Introduction, para 4339. The General Introduction also recognizes an exception to this classification in Article 1(4) of Protocol I, which includes within the definition of "international armed conflict" armed conflicts where peoples fight against colonial domination and alien occupation, and against all racist regimes.

should apply depending upon the nexus of the crime to the particular conflict.[81]

The conflicts which took place between the armed forces of the FRY and the KLA prior to NATO's involvement, were most probably non-international within the meaning of the Geneva Conventions and the ICTY Statute. Nevertheless, all of the relevant underlying acts used by the court below to support the war crimes conviction took place during the period of NATO involvement.

2. Non-International Armed Conflict

As previously discussed, certain prohibitions are applicable to a conflict that is non-international in character.[82] However, not all non-international conflicts rise to the level of an "armed conflict", and therefore not all violations of such prohibitions rise to the level of war crimes under international law. Protocol II expressly provides that non-international armed conflict does not encompass situations involving "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[83] An instructive case is that of *Centre pour l'egalite des chances et la lutte contre le racisme v. C et B.*[84], upholding acquittal of two Belgian soldiers who had been members of the UNOSOM II operation in Somalia in 1993 and who were charged with violation of Common Article 3 of the Geneva Conventions ("Common

---

81 Although one could make the argument that the KLA was engaged in a struggle for national liberation, thus falling within the "racist regime" exception of Article 1(4) of Protocol I, this argument has generally not been well-received. As one commentator has noted, "it remains unclear whether one could successfully argue before the ICTY that the KLA should be regarded as a national liberation movement under Article 1(4) of the Additional Protocol I." *See*, Sonja Boelaert-Suominen, The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict, International Review of the Red Cross No. 837, pp. 217-252, March 31, 2000. This argument is further weakened by the persistent refusal of the international community to recognize the independence of Kosovo following the withdrawal of Serb forces in June of 1999.

82 Common Article 3 to the Geneva Conventions and Protocol II of the Geneva Conventions, The Geneva Conventions of August 12, 1949, Geneva: ICRC, undated, and in protocols Additional to the Geneva Conventions of 12 August 1949, Geneva: ICRC, 1977.

83 Protocol II, Art. 1(2).

84 Journal des Tribunaux, 4 April 1998, at. 286-289.

Article 3") on the grounds that there was no armed conflict since fighting involved irregular, anarchic armed groups with no responsible command.

Whether an internal armed conflict constitutes "an isolated or sporadic act of violence" or a non-international armed conflict sufficient to invoke Common Article 3 of the Geneva Conventions and Protocol II, must be determined on a case-by-case basis and depends upon "the degree of intensity" of the conflict.[85] However, for the same reason that a court, when presented with the appropriate evidence and asked to take into account "notorious" facts, may find the existence of an armed conflict in analyzing the circumstances that existed in Kamenica and the surrounding villages in the Spring of 1999, given obtainable evidence it is unlikely that a court will find that no armed conflict existed because the hostilities involved "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence." The United Nations Resolutions, as well as the killings, torture and cruel treatment of civilian the civilian population has the potential to provide robust evidence of the intensity of the conflicts in Kosovo.

Moreover, Article 3 has been regarded as the "general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal]…"[86] More recently, in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* the Trial Chamber held that Article 3 therefore

> …functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[87]

Article 3, unlike Article 2, applies to both international and non-international armed conflicts. Because of this distinction, even if the

---

85 Commentary to Protocol II, Part I.

86 Tadic, *supra*.

87 Kunarac, Kovac and Vukovic, *supra*.

conflict were not international in character, and therefore outside the ambit of Article 2, Trajkovic's conduct falls squarely within the crimes contemplated by Article 3, and therefore subject to prosecution before the ICTY.

B. Prohibited Act Against Protected Persons or Property

1. Protected Persons and Property

The prohibition against the commission of "grave breaches" of the Geneva Conventions applies only to persons or property protected by the convention and is limited to the context of an international armed conflict. "Protected persons" are defined in Article 4 of the Fourth Geneva Convention as "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." In applying Article 2 of the ICTY Statute, the Trial Chamber noted in Nikolic that

> For Article 2 of the Statute, relating to the grave breaches provisions on the Geneva Conventions of 1949, to apply, the victims of the alleged crimes must be "persons… protected under the provisions of the relevant Geneva Convention.[88]

In that case, the Chamber concluded that because the Muslim population was systematically disarmed, there was generally no resistance and since all the detainees were civilians, they were therefore "protected persons" within the meaning of the Geneva Convention. The basic question is whether civilians in the hands of a party to an armed conflict of which they are nationals may hold protected status, as contemplated by Article 2. The majority of the Trial Chamber in the Tadic case found no difficulty in applying the standard set out in Article 2. In their view, the victims could not be considered as protected persons for the purposes of the Geneva Conventions, which defines protected persons as

---

[88] Nikolic, ITCY, Rule 61 Decision, October 20, 1995.

> those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[89]

However, in overruling the Trial Chamber, the Appeals Chamber in the Tadic case applying the agency test, held that

> the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals.[90]

The same issue was addressed again in the Delalic[91] case where the Appeals Chamber wholly adopted the reasoning of the Appeals Chamber in Tadic, holding that, "…the Appeals Chamber will follow the law in relation to protected persons as identified in the Tadic Appeal Judgment…."[92] More important, the Appeals Chamber further elaborated on the Tadic reasoning. It stated:

> In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves,

---

89 Geneva Convention IV, Art. 4.

90 Tadic, *supra*.

91 Prosecutor v. Delalic, ITCY, IT-96-21, February 20, 2001.

92 *Id*.

> are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection….[93]

These cases point to the conclusion that the status of protected persons is not necessarily determined by the "nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterizations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State."[94]

The evidence can be used to argue that the Albanian ethnicity of the victims was the common factor in their inhumane and cruel treatment: many of them were listed and tortured by Serbian police forces[95]; over 100 Albanian families were expelled from their homes on April 18, 1999[96]; the accused shot at Arif Pireva and Mevlud Fazliu, as corroborated by Xhevdet Krasniqi, for hoisting an Albanian flag[97]. Many similar incidents strongly support the conclusion that the perpetrators were motivated by ethnic hatred. One can therefore conclude that the victims were protected persons within the Geneva Conventions, following the Appeals Chamber decisions cited above.

As has been noted by one commentator, the "grave breaches" regime of the Geneva Conventions, and hence Article 2 of the Statute of the ICTY, "protects property as well as persons, but the former only in cases of an occupation."[98] The Geneva Conventions prohibits the

> destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to

---

93 *Id*.

94 *Id*.

95 *See* testimony of Kadri Isufi, Nazmije Veseli and Fatmire Kastrati at 34, 30 and 39.

96 *See* trial testimony of Raif Ramnabaja, at 13

97 *See* testimony of Arif Pireva, Mevlud Fazliu and Xhevdet Krasniqi at p. 3 of the Verdict.

98 John R. W. D. Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 84, 1998.

> social or cooperative organizations…, except where such destruction is rendered absolutely necessary by military operations.[99]

The occupation may be partial or total, but there must be an occupation before the property becomes "protected". In addition, as with all "grave breaches" of the Geneva Conventions, the occupation must occur within the context of an international armed conflict. Even if one concludes, *arguendo,* that an international armed conflict took place in Kosovo, an "occupation" probably did not occur, since Kosovo was a constituent part of the sovereign territory of the FRY, and therefore the armed forces of the FRY were legally on the territory of Kosovo. Therefore, the Geneva Conventions protected the persons, but not the property in Kosovo during the armed conflict with the FRY. Accordingly, destruction of property would not meet the Article 142 violation of international law requirement.

2. Prohibited Act

a. Murder

It is well-established that international law prohibits murder during periods of armed conflict, whether international or internal in nature, where there is a close nexus between the act and the conflict.[100]

---

[99] Geneva Convention IV, art. 53.

[100] Prosecutor v. Krstic, ITCY, IT-98-33, February 8, 2001. *See, e.g.,* the Charter of the International Military Tribunal . . . ("War crimes: namely, violations of the laws or customs of war. Such violations include, but not be limited to murder . . . "); Statute of International Criminal Tribunal for Yugoslavia, Article 5 (declaring that murder is a violation of international law, whether in an international or internal conflict, punishable by the court); Rome Statute of the International Criminal Court, Article 8(2)(a) ("For the purpose of this Statute, 'war Crimes' means: (a) grave breaches of the Geneva Conventions . . . any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing."), Article 8(2)(c) ("In the case of armed conflict not of an international conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions . . . any of the following acts committed against persons taking no active part in the hostilities . . .: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Article II.1(b) ("War Crimes. Atrocities or offences against person or

(continued…)

"Willful killing" is an enumerated "grave breach" of the Geneva Conventions. Common Article 3, which applies to both international and non-international armed conflicts, establishes minimum rules for the protection of victims who are not participants of armed conflict. It states:

> Persons taking not active part in the hostilities . . . shall in all circumstances be treated humanely.... To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and persons, *in particular murder of all kinds,* mutilation, cruel treatment and torture.[101]

The trial court found Trajkovic guilty of the war crimes which were embodied by the murders of nine non-combatants.[102] On April 18, 1999, a planned and organized attack was undertaken by military and police forces on the villages of Strezovc, Leshtar, Rahovice, and Drileve. During the attacks the forces killed Ahmet Mehmeti, Arsim Isufi, Shemsi Isufi and Ramadan Kastrati. On May 11, in other planned attacks, military and police forces murdered Ramadan Latifaj, Mehmet Savedinaj, Ismail Ismajli, Nezvat Kryezlu, and Asslan Thaqi, all of whom were non-combatants. Trajkovic's war crimes conviction based upon murder was apparently through his command responsibility, since there was no credible evidence based on any factual basis that he gave direct orders to do, or personally participated in, these acts.[103] Assuming an armed conflict was in progress and there was a nexus between the murders and the conflict, Trajkovic could be found guilty of war crimes under international law through his command responsibility. However, all of the

---

(…continued)

property, constituting violations of the laws or customs of war, including but not limited to, murder . . .").

101 Geneva Convention IV, art. 3(1)(a) (emphasis added).

102 Trajkovic, *supra*.

103 The verdict's reasoning does not state, in its list of murders, any link to the accused except for the participation of police officers which the court implies are under his command.

requirements of command responsibility liability must be proven and explained in the verdict's reasoning.

b. Physical Injury

One of the enumerated "grave breaches" of the Geneva Conventions is "willfully causing great suffering or serious injury to body or health."[104] Furthermore, Common Article 3 prohibits violence of all kinds against non-participants. It states, "Persons taking no active part in the hostilities ...shall in all circumstances be treated humanely... ". To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) *violence to life and person*..."[105] (emphasis added). The Rome Statute of the International Criminal Court similarly proscribes attacks against civilians. It makes "violence to life and person" punishable as a "serious violation of Article 3."[106] The ICTY and ICTR have repeatedly emphasized that for a crime to be a violation of international law it must be "serious."[107] The ICTR in Bagilishema held that a serious violation is "a breach of rule protecting important values which must involve grave consequences for the victim."[108]

Trajkovic was convicted of the war crimes of the police forces injuring 6 people, 5 with firearms and another in an unspecified manner. On April 1, 1999 a subordinate shot Mehmet Ramabaja, who sustained injuries to his hand and was in a hospital as a result. On April 18, 1999, the same day as the attacks on Strezovc, Leshtar, Rahovice, and Drileve, Trajkovic's subordinates shot Zeqir Demolli,[109] Avdyl Demolli[110] and

---

104 Geneva Convention IV, art. 146.

105 *Id.*, art. 3(1)(a).

106 Rome Statute, Art. 8(2)(c)(i).

107 *See*, Prosecutor v. Kvoca, ITCY, IT-98-30/1, February 11, 2001; Vukovic, *supra*; Tadic, *supra*.

108 Prosecutor v. Ignace Bagilishema, ICTR, IT-95-1A, June 7, 2001.

109 He was wounded in the leg, did not feel the wounding, and did not have a place to get treatment and was never treated. At 49-50. As described, this does not rise to the level of "grave" injury.

Bahtije Sinani.[111] On May 4, 1999 Arif Krasniqi was injured by policemen in the town of Kamenica.[112] Assuming an armed conflict was in progress and there was a nexus between the attacks that led to the injuries and the conflict, Trajkovic could have be found guilty through the doctrine of command influence of violating international law for the "grave" injuries to these non-combatants, those being Mehmet Ramabaja and Bahtije Sinani.

c. Kidnapping, Maltreatment and Torture

Common Article 3 also prohibits kidnapping, maltreatment and torture of non-combatants in internal armed conflicts. It states:

> Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person . . . mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment.[113]

In addition, "torture or inhuman treatment" is an enumerated "grave breach" of the Geneva Conventions.

Under the generally accepted definition under international law, torture has the following elements:

> (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim

---

(…continued)

110 He was injured on the right hip and treated in Skopje, although unknown whether in a doctor's office or in hospital. At 48-49. As described, this does not rise to the level of "grave" injury.

111 Treated in the Pristina hospital for two bullet wounds, in back and in the leg. At 44.

112 He was wounded in the leg, and there is no further information. As described, this does not rise to the level of "grave" injury.

113 Common Article 3(1).

or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[114]

Trajkovic was convicted of the war crime of kidnapping and maltreatment of Hawif Demolli on April 17, 1999. The victim identified his captors as two policemen who were subordinates of Trajkovic. Neither the facts set out in the conviction or the testimony detail the circumstances surrounding the kidnapping and the torture,[115] and this Opinion is that the level of evidence in the verdict reasoning does not raise this to a war crime.[116]

In contrast, Trajkovic was also convicted of the war crime of the kidnapping, maltreating, and torturing of Rexhep Morina, inside and outside of a police station, where the facts were sufficiently developed, assuming proof of a nexus and other required elements, to fall within the scope of the Geneva Conventions.[117]

d. Eviction

While Common Article 3 does not specifically prohibit the eviction of a civilian population, other international law authorities do so. Article

---

[114] Prosecutor v. Anto Furundzifa, ICTY, IT-95-17/1, July 7, 2000 (holding that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention.").

[115] The victim stated: "the most horrible maltreatments started. They took us from Elektrokosova and told us that they were taking us to Novoberde to execute us and they took us there with our hands and eyes bound and once there the beatings, maltreatments started again." At 26. Unfortunately, examination did not develop what acts comprised the "maltreatments."

[116] However if the above-listed elements had been met, then Trajkovic could have be guilty under international law of torture. He could also be guilty of taking a hostage and of "other outrages upon personal dignity."

[117] The victim was beaten and kicked, and hit on the head with a metal rod, in part to coerce a confession. He stated "the doctor told me that the back of my head was damaged by the beatings." At 110-112.

2(g) of the ICTY Statute prohibits the "unlawful deportation or transfer or unlawful confinement of a civilian." Furthermore, the Rome Statute lists "intentionally directing attacks against the civilian population . . . not taking part in the hostilities" and "ordering the displacement of the civilian population for reasons related to the conflict" as crimes under international law.[118] The issue then becomes whether the language of YCC Article 142 refers to such limited authorities when it requires finding "rules of international law effective at the time of war, armed conflict…". The trial court convicted Trajkovic for evicting by force the civilian populations of the following villages: Strezovc, Leshtar, Rhovice, Rileve, and Petrovc on April 18 and 19, 1999. It found that the events were planned and carried out by both military and police forces.[119] If there is a nexus, these acts could have been argued to be war crimes, and Trajkovic could then have been found guilty under the theory of command responsibility.

e. Arson

It can be seen from the above that the Geneva Convention protects the persons but not the property in the Kosovo conflict. Furthermore, Common Article 3 does not deal with crimes against property. Nevertheless, it could be argued that a court may apply other international law instruments which may encompass arson within the ambit of war crimes. The UN Security Council Resolution authorizing the ICTY makes punishable "wanton destruction of cities, towns or villages, or devastation not justified by military necessity"[120] Article 3(c) of the ICTY Statute prohibits "attack, or bombardment, by whatever means, of

---

118 The Rome Statute, Art. 8(2)(c),(e).

119 Trajkovic, *supra*.

120 ICTY Statute, art. 3(b), as amended 30 November 2000 by Resolution 1329. *See also* International Military Tribunal in 1945, which recognized "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a War Crime and a violation of International Law. "Charter of the International Military Tribunal," in Agreement for the Prosecution and Punishment of the

(continued…)

undefended towns, villages, dwellings, or buildings," a prohibition that is broad enough to encompass attack by arson. As with eviction, the question is the interpretation of the scope of the YCC Article 142 "international law" phrase. It is unlikely that the drafters of Article 142 meant to incorporate arson, however, given the lack of coverage in Common Article 3, and the paucity of other authority for its inclusion.

Even assuming *arguendo* arson is within the scope of Article 142, the trial court found Trajkovic guilty [one can infer through command responsibility theory] of the war crime of arson because of the events of the April 19 attacks. In a planned action, the homes of Murtez Sherifi and Fadil Sherifi were burnt. The arson was a direct result of the police and military attack on the village of Petrovc, and as a result is a violation of international law, assuming the requisite conflict and nexus. The trial court found Trajkovic guilty of a war crime for arson committed against the home [*sic* – this is an error; upon a review of the testimony the property referred to was actually the driving school] and bus of Hajdar Ramabaja, but again it must be implied that the liability was from command responsibility.

C. Nexus Between Armed Conflict and Prohibited Act

The ICTY has enunciated a "nexus" standard to be applied in order to ensure that the commission of ordinary criminal offenses, even if they are "severe" in nature, are not prosecuted as war crimes. In Tadic the Trial Chamber II enunciated the "nexus" requirement as follows:

> The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offense and the armed conflict, which gives rise to the applicability of international humanitarian law.[121]

(…continued)

Major War Criminals of the European Axis (London Agreement), August 8, 1945, 58 State. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

[121] Tadic, *supra*.

This "nexus test" has been cited with approval in subsequent decisions of both the ICTY and ICTR. The crux of the test is that the prosecution must establish the existence of a link between the alleged criminal acts and the armed conflict[122]. In Tadic, the Appeals Chamber held that the alleged offense must be "closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict".[123] However, it is not required that the criminal acts take place in the same geographical location or within the exact time-frame as the armed conflict. Therefore, the fact that the crimes took place in different geographical locations and on different dates is of no consequence, as long as it is clear that the atrocities were committed because of the conflict.

This issue was addressed recently in Prosecutor v. Delalic[124], where the Appeals Chamber upheld the Trial Chamber's opinion that it is "axiomatic" that not every serious crime committed during the armed conflict in Bosnia Herzegovina can be regarded as a violation of international humanitarian law. Specifically, it held that there "must be an obvious link between the criminal act and the armed conflict…"[125]

In the present case, the nature of the charges lends credence to the existence of a nexus between Trajkovic's criminal acts and the armed conflict in Kosovo at large. The alleged crimes are temporally proximate and all occurred in Kamenica and in villages surrounding that locality, where Trajkovic was the Police Chief, forming a pattern that links Trajkovic to the armed conflict taking place in other parts of Kosovo. Statements made by Trajkovic to Albanian-Kosovars, notably his statement made to Ramadan Morina, albeit after the cessation of

---

122 Bangilishema, *supra*.
123 Tadic, *supra*.
124 Delalic, *supra*.
125 Delalic, *supra*.

hostilities, that "Serbians will fight until the last Albanian will die," [126] arguably suggest that not only was Trajkovic aware of the factual circumstances of the larger armed conflict, but that he enthusiastically supported it. This intent is however denied by Trajkovic. If the court had combined in its verdict opinion this allegation of anti-Albanian intent with facts on the "notorious" armed conflict in Kosovo between Albanian and Serb forces, which involved the imposition of Serbian control over the region and arguably included widespread massacres of Kosovar Albanians, the court could have concluded that it all demonstrated an awareness on the part of Trajkovic of large-scale efforts to physically eliminate or purge all Albanians from Kosovo, thus establishing the requisite relationship between the alleged crimes committed by Trajkovic and the armed conflict occurring in other parts of Kosovo. However, the court below did not give this analysis in its verdict.

This Opinion concludes that while there was ample evidence to support the finding of an "obvious link", thus satisfying the nexus element of a war crimes charge, the verdict reasoning failed to properly state such, and did not avail itself of "notorious facts," which should in any event have been first stated to the parties for their comments and any proposals for additional evidence during the main trial.

D. Conclusion

The facts presented at trial, if they had been combined with facts known or notorious, and if command responsibility was proven, could have supported the finding of liability of Trajkovic for most of the stated war crimes under international law, including both Articles 2 and 3 of the ICTY Statute and Common Article 3 of the Geneva Conventions and Protocol II. However, verdict reasoning failed to specify the facts and analysis to support its finding of guilt.

---

[126] Trajkovic, *supra*.

IV. Command Responsibility Issues

This is the critical issue regarding the war crimes issues: whether the court below properly found Momcillo Trajkovic accountable for war crimes (or crimes against humanity) under the principle of command responsibility. This Opinion has concluded that he was not properly found guilty of any of the crimes under individual liability [the direct giving of orders to commit the crimes, or committing them as a co-perpetrator, or under accomplice liability].

The incorporation of "international law" of article 142 must also incorporate theories of command responsibility and other possible liability under international law which are applicable to the substantive international law of war crimes and crimes against humanity

This first explains (1) why the issue of command responsibility must be dealt with alongside that of individual/personal responsibility ("The Subsuming Rule"). Secondly, it highlights a crucial point to bear in mind: the difficulty, as reflected particularly in (2) the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) in successfully invoking command responsibility at all ("A Reality Check"). Next, it provides (3) an analysis of the theory. Finally, it (4) applies the theory of command responsibility to the facts, assuming them to be true, of the present case. The Opinion will not focus on the command responsibility stemming from giving direct orders, since all evidence regarding the victims' and witnesses' belief that the accused gave the orders to shoot/kill/destroy is either speculative and not based on fact, or not credible.[127] This Opinion assumes the court below relied on the command responsibility coming directly from being at the top of a hierarchy of police officers, even if the giving of orders to murder and shoot did not occur.

---

[127] This is discussed *infra* in depth. *See, e.g.,* comparison of the trial *vs.* investigation testimony of Mehmet Ramnabaja.

This Opinion then concludes that as to his being responsible under the type of command responsibility—based on evidence of control over subordinates, knowledge of their crimes, and ability and failure to prevent or punish them— Momcillo Trajkovic may be liable under such command responsibility. His official position of authority over subordinate Kamenica policemen, buttressed by evidence of his actual authority over them and in the community in general; his possible knowledge of subordinates' crimes; and his obvious failure to prevent or punish them bolster a finding of command responsibility for the acts of policemen under him. A very important caveat is that, under international law, the lack of evidence of some information in his possession that his subordinates were committing crimes, will present a difficulty in meeting the knowledge requirement. Those who are more in a position to conclude from the evidence that he had a specific reason to know of his subordinates' acts, are better situated to opine on whether he had the requisite knowledge.

A. The Subsuming Rule

Individual responsibility subsumes command responsibility. Because of this "subsuming rule," we must first evaluate whether individual responsibility might attach, as a finding that a defendant is individually responsible for a war crime or crime against humanity will preclude the need to analyze his culpability under command responsibility. The rule is stated in the statute and decisions of the ICTY.

Article 7 of the Statute of the ICTY authorizes the Tribunal to impose individual and command responsibility (also called "superior responsibility") upon persons on the following bases: Article 7(1) states 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."[128] Article 7(3) goes on to state that "[t]he 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."[129]

The Trial Chamber in *Prosecutor v. Clement Keshena and Orbed Ruminant* [130], in its judgment of 21 May 1999 (paragraph 223), and, in *Prosecutor v. Tahoma Basic* [131] in paragraph 605 of its judgment of 3 March 2000, adhered to the belief that where a commander participates in the commission of a crime through his subordinates, by "planning", "instigating" or "ordering" the commission of the crime, any superior/command responsibility under Article 7(3) is subsumed by individual/personal responsibility, as laid out in Article 7(1). The same principle appears to apply to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine, through the physical acts of his subordinates.

Excepted from the subsuming rule (which precludes the concurrent application of Articles 7(3) and 7(1)) are those cases which involve the commission of subsequent crimes. In such cases, the failure to punish past crimes, which entail the commander responsibility under Article 7(3), may also be the basis for individual liability under Article 7(1) for either aiding and abetting or instigating the commission of further crimes[132].

Thus, as to any particular criminal act found to be a war crime or crime against humanity sanctioned under international law, command

---

[128] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1) (available at <http://www.un.org/icty/basic/statut/stat2000.htm#7>) (emphasis added).

[129] *Id.*, art. 7(3) (emphasis added).

[130] Case No. ICTR-95-1-T(ICTR), 21 May 1999

[131] Case No. IT-95-14-T(ICTY), 3 March 2000

[132] See *Blaskic* judgment, par. 337

responsibility can only attach where the accused cannot be found individually responsible for the crime. Therefore an individual responsibility analysis must precede and may preclude a command responsibility analysis. It is this Opinion that any liability for the war crimes enumerated by the Verdict must be through command responsibility, and not through individual responsibility.

The present analysis, however, sets forth the requirements for findings of some individual responsibility in the context of determining command responsibility. This is because (1) different acts cited in the verdict and witness testimony lend themselves to different theories under which the defendant might be found responsible, and (2) much of the evidence supporting the factual findings is circumstantial, or bald and factually-unsupported conjecture by the victims and witnesses, at best.

B. A Reality Check: The Difficulty of Successfully Invoking Command Responsibility in Practice.

Command responsibility has been invoked in only a handful of cases with very modest success. In *Celebici*[133], for example, one Music, as a de facto commander of the Celebici prison-camp, was held criminally responsible for the acts of the personnel in the camp on the basis of the theory of superior responsibility.

In most cases, however, where the accused is charged with command responsibility in addition to or alternatively with individual liability, the theory fails to carry due to a variety of reasons. In *Celebici*, Delalic was not held responsible for the crimes alleged to have been committed in the Celebici prison-camp by other persons within the camp

because the Trial chamber found that the Prosecution had failed to establish that Delalic had command authority and, therefore, superior responsibility over the camp, its commander, deputy commander or guards.

In ***Omarska***[134], the Prosecution charged four of the total five accused, with command responsibility, in addition to charges of individual liability. The Court held that none of the accused incurred command liability because the evidence did not sufficiently establish a superior-subordinate relationship between them (the accused) and the known perpetrators of the crime. Moreover, there was no credible evidence that the accused exercised effective control over their inferiors who allegedly committed the crimes, even though each of the accused was found to have varying degrees of de facto authority within the camp. Furthermore, the Court in ***Omarska*** expressed some doubt as to whether, within the context of a joint criminal enterprise, a co-perpetrator or aider or abettor who was held jointly responsible for the totality of crimes committed during his tenure on the basis of a "criminal enterprise theory", could be found separately responsible for *part* of those crimes on an Article 7(3) superior responsibility theory. The Court studiously decided to avoid addressing this thorny issue in this particular case. Reference to the "subsuming rule" explained above would seem to preclude such double liability.

In ***Krstic***[135], although the Trial Chamber found that Krstic exercised effective control over the Drina Corps troops involved in the killings, it did not enter a conviction under Article 7(3) because it was of the view that Krstic's responsibility for the participation of his troops in the killings was

(…continued)

[133] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T(ICTY), 16 November 1998

[134] *Prosecutor v. Miroslav Kvocka, Milojika Kos, Mlado Radic, Zoran Zigic and Dragolijub Prcac*, Case No. IT-98-30/1-T(ICTY), 2 November 2001

[135] *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T(ICTY), 2 August 2001

sufficiently expressed in a finding of guilt under Article 7(1) (the subsuming rule).

Thus the subsuming rule and the difficulty of fulfilling the elements of command responsibility have rendered findings of command responsibility relatively rare. To now turn to analysis of command responsibility.

C. Command Responsibility

In *Delalic* (*supra*), the doctrine of command responsibility was defined as being "the power of the superior to control the acts of his subordinates." In this case, this doctrine was further broken down to cover *direct command responsibility* and *indirect command responsibility*. Direct command is recognized as being akin in test to individual responsibility, and therefore is covered by Article 7(1), set forth above. Indirect command, however, covers omissions on the part of the person in command. This is covered by Article 7(3) of the Statute, and is discussed below.

D. Three Required Elements

A court must find that three elements are fulfilled to make a finding that an accused had command responsibility for war crimes or crimes against humanity. He must have had a superior-subordinate relationship to the actors, wherein he had the power to control their acts; he must have had knowledge—actual or imputed—of his subordinates' criminal acts; and he must have failed to take necessary and reasonable measures to prevent his subordinates' criminal acts[136].

(1.) Superior-subordinate relationship: the two necessary components of the relationship are the power of the superior to control the acts of his subordinates.

The power of the superior can be inferred from a variety of factors. For instance :

---

[136] See John Jones, *supra,* at 136 [following *Delalic*, par. 354,383,394]

(i) De facto or de jure control: both types of control are relevant to command responsibility. Since a showing of de facto power to control is sufficient, the fact that a defendant lacks formal legal authority does not preclude the existence of responsibility (*Delalic, supra*). It is actual de facto control over subordinates, regardless if the official status of a defendant, that governs a finding of control. The following factors are mostly different prisms through which to determine de facto control.

(ii) Type of superior: The power can be held by any type of superior, whether he/she be a military, political or civil leader.[137]

(iii) Position of command: The defendant should be in a position of command. This can be an informal position so long as the defendant has the ability to know about the actions of his subordinates and do something to prevent the actions.[138] In *Pohl*[139], it was found that being a definite and integral figure in the situation was sufficient to show command. This position-of-command analysis once again underscores that the absence of de jure authority will not preclude liability.

(iv) The defendant should have power over his subordinates. This is satisfied if the defendant had the ability to prevent the actions of his subordinates.[140] In the Tokyo Tribunal case of Lieutenant General Muto, the Chamber found that even where a defendant held no formal powers of command over the subordinates, he could still be responsible for not *preventing* their actions. In other words, if a defendant has the ability to prevent the crimes, he has an obligation to prevent them regardless of his formal power.[141]

(v) Informal Structure: This refers to the blurring of command that can occur during times of war. This bolsters the theory that, even when a

---

[137] See Jones, *supra*, at 137 [quoting *Delalic*, par. 363]
[138] See Jones, *supra*, at 137 [quoting *Delalic*, par. 370]
[139] *United States v. Oswald Pohl et al*, Vol XI, TWC, 462, 512
[140] See Jones, *supra*, at 137 [quoting *Delalic*, par. 377]
[141] See *Delalic*, paragraph 391

defendant does not hold a specific or official position of command, he can nonetheless occupy an assumed or informal position.[142]

(vi) The Ability to Transmit Reports: Command will be assumed if the defendant had the ability to report the actions of his subordinates, even if he lacked the power to actually suppress the crimes. In the Tokyo Tribunal case of Foreign Minister Hirota, for instance, the Chamber found that although Hirota lacked the legal authority to suppress the crimes that were committed, he was nonetheless responsible because he could (or, should) have used any influence that he had to pressure those in power to stop the criminal behavior.[143]

(vii) The various types of control that satisfy the control requirement are operational; tactical; administrative; executive; and influential control.

Again, despite these specific types of control, the Trial Chamber has held that it should "be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts", suggesting that the Chamber would not allow defendants to hide from culpability behind a formal title, if a fact-based analysis revealed actual control over subordinates.

(2.) Knowledge

The second element, knowledge, requires that the defendant knew or should have known of the crimes of his subordinates. For instance, in *Delalic* and *Omarska* (*supra*), there was evidence that defendants had constructive notice of their subordinates' crimes. This mens rea requirement can be shown in any of the three following ways[144]:

---

[142] *Delalic*

[143] *The Complete Transcripts of the Proceedings of the International Military Tribunal for the far East,* reprinted in R. John Pritchard and Sonia Magbunua Zaide (eds.), The Tokyo War Crimes Trial, Vol 20, Garland Publishing: New York & London 1981 [cited in *Delalic*, par. 357]

[144] *Delalic*, 383.

(a) Actual knowledge through direct evidence.

(b) Actual knowledge through circumstantial evidence, with a presumption of knowledge where the crimes of the subordinates are a matter of public notoriety, are numerous, or occur over a prolonged period of time or in a wide geographical area. Special factors which indicate knowledge are:

- the number of illegal acts;
- the type of illegal acts;
- the scope of illegal acts;
- the time during which the illegal acts occurred;
- the number and type of troops involved;
- the logistics involved, if any;
- the geographical location of the acts;
- the widespread occurrence of the acts;
- the tactical tempo of operations;
- the modus operandi of similar illegal acts;
- the officers and staff involved; and
- the location of the commander at the time;

(c) Constructive knowledge where there is wanton disregard of, or failure to obtain, information of a general nature within the reasonable access of the defendant indicating the likelihood of actual or prospective criminal conduct on the part of his subordinates.

Evidence of statements made by other than the witness testifying in court, known in common law as “hearsay,” may be relevant to counter the defendant’s negation of responsibility or knowledge, the theory being that if the witness had heard of the information, then so should have the defendant, and thereafter, acted upon it[145]

---

[145] *Xuncax v. Gramajo*, 886 F.Supp. 162

(3.) Necessary and Reasonable Measures to Prevent the Criminal acts of Subordinates.

The third element of command responsibility revolves around the crucial question whether the defendant took necessary and reasonable measures to prevent the criminal acts of subordinates or to punish them.

Two inquiries must be made. First, whether the defendant had a legal obligation to act to prevent his/her subordinates' criminal acts.[146] This is an important pre-requisite. International law imposes an affirmative duty on superiors to stop others from violating international humanitarian law. This is a concurrent legal and moral obligation. For instance, in *Aleksovski* (*supra*), the legal obligation to act was mentioned, but, there was also a suggestion that so long as the defendant was a superior and had *mens rea*, he had a legal obligation to act. Second, the court must find that the defendant indeed made the omission to take "necessary and reasonable measures" to prevent the crimes or punish the actors. This is a fact-based inquiry and, according to tribunals commentator, John Jones, affords no formulated standard to prevent the crimes[147]

(4.) Result: Command Responsibility of Accused for War Crimes

It is the conclusion of this Opinion that while the record showed the potential for proving such liability[148], the evidence before the court, in light

---

[146] See *Delalic*, *supra*.

[147] See Jones, *supra*, at 139

[148] This International Public Prosecutor emphasizes that in a re-trial, the testimony should be examined in depth, and other witnesses called to develop the possible hierarchical control by the accused of the police officers who committed many of the crimes stated by the victims and witnesses. This could provide sufficient evidence to the court, or may result in exculpatory testimony. It is clear that the witnesses were not properly examined as to the many conclusions they stated on the responsibility of the accused, and that possible bias against the accused was not sufficiently explored. The statement of facts *supra* contains in the footnotes examples of the paucity of detailed examination, confrontation with earlier and varying statements to the investigating judge, and questions regarding the factual foundations for the statements made as conclusions in trial.

of its verdict reasoning, did not provide a legal basis for a finding of command responsibility Based on the evidence adduced in trial, and thus not considering here the defense witness requests denied by the court or the veracity of the witnesses, Momcillo Trajkovic had the requisite superior-subordinate relationship with the actors to meet that first element of command responsibility. As stated above, to satisfy the relationship requirement, Trajkovic must have had the power—de facto or de jure—to control the acts of subordinates. As Chief of Police, Trajkovic would seem to have de jure control over the acts of policemen. Thus, the acts of Kamenica policemen who kidnapped, maltreated, tortured, and killed various victims could all be imputed to Trajkovic if the other command responsibility elements are met.

Moreover, there is evidence Trajkovic had de facto control, if the statement is believed that "no one, not the local Serbians and not even the paramilitaries could dare to act without the permission and the order of [the accused]."[149] There is also some evidence of his de facto power in the community in the statements that local people went to him for information on missing relatives. Any credible evidence that Trajkovic ordered criminal acts to be done by the police, which were actually carried out, would support a finding that he actually had control over subordinates. It is this Opinion, however, that such was not present at trial. If it existed, such credible evidence could (1) support a finding of individual responsibility for those crimes, and (2) provide evidence of his control over subordinates to impute to him responsibility for other criminal acts of the subordinates.

But the *Delalic* chamber was also clear that the link between the superior's omissions and the subordinates' acts must be clearly established.

> "While the Trial Chamber must at all times be alive to the realities of any given situation and

---

[149] See witness statement of Nazmije Veseli.

> be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote."

The court should consider the circumstantial nature of the evidence and decline to hold Trajkovic responsible where, as here, the evidentiary link is too tenuous.

There is some evidence that Trajkovic had actual and constructive knowledge of the subordinates' crimes. Evidence of actual knowledge can be direct or circumstantial. The accused's alleged warning, if true, before the fact of the burning of the bus and driving school could be taken to supply direct evidence of actual knowledge. His subsequent failure to act to prevent the burning would, in that case, provide the third element. The problem here is there is only circumstantial evidence that his subordinates carried out the crime. Although the grounds for a supposition of culpability is strong, the criminal standard of proof "to a [moral] certainty"—would not seem to be met by a supposition. Moreover, there are the previously-mentioned questions of credibility as well as arson of commercial property not being protected by customary international law or common Article 3 in the circumstances of the Kosovo conflict. The evidence that "no villages could be surrounded and blocked without [the accused's] permission " and "none of the lists could have been formed without orders from [the accused]"[150] is circumstantial evidence tending to show actual knowledge, or at least constructive knowledge, although as it is from a witness forced out of police employment 10 years before, with a definite bias against the accused, is

---

[150] See trial testimony of Enver Ramizi, a former law enforcement officer in Gjilan, on the duties of the chief agency and police, at page 167.

in itself not credible. That the verdict reasoning does not even discuss this bias is error in itself.

Under the guidelines for actual knowledge through circumstantial evidence, much knowledge could have be imputed to Trajkovic by the court and through testimony of the media coverage of the crimes, simply because of the notoriety of the crimes involved in a relatively small community where they simply could not have gone unnoticed to a police chief. This is particularly true considering the number of illegal acts, the scope of the acts, their geographical location, widespread occurrence, and the modus operandi of similar acts. Many of the incidents reported involve evacuations of villages, with the villages subsequently being burnt. Such serious and large scale acts could hardly go by unnoticed. The acts were also numerous, which would make them more likely to be noticed by the defendant. The acts were going on for months, and covered a wide geographical area, which would again serve as an indication to the defendant as to what was happening. In many of the incidents, large numbers of paramilitaries and policemen are involved, thus drawing further attention to the acts. All of these factors would point to the fact that the defendant must have been aware of the crimes being committed around him. Unfortunately, the verdict reasoning should have discussed this and made such possible findings explicit, and did not.

As the ICTY Trial Chamber II pointed out in *Delalic*, however, there needs to be some information in the possession of the alleged superior that his subordinates are committing crimes. This does not need to be specific information as to the specific acts, but it must be more than a mere sense that bad things were going on. “For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the

required knowledge."[151] In this case, he must have known of the general nature of the acts being perpetrated. Moreover, Kamenica policemen were known to be perpetrators. If the policemen's participation was sufficiently widely known—which is not possible to determine conclusively from the evidence which was presented—knowledge of their crimes could be imputed to their chief.

Constructive knowledge with wanton disregard also can satisfy the knowledge requirement. However, this requires evidence that the defendant disregarded information or failed to obtain information regarding the incidents that would have been reasonable to obtain. There is no evidence of this.

If the first two elements are satisfied, the defendant must ultimately be shown to have failed to act to prevent or punish the crimes of his subordinates in order to be culpable as a superior for failure to control his subordinates. It is certainly true that there is no evidence he either attempted to stop or punish the actors. But it is difficult, with the facts as presented, to find criminal acts for which all three elements are met, the bus incident aside.

Moreover, that the defendant had a position of de jure control—Chief of Police in Kamenica, is based on believing Mr. Ramizi but not the accused's description of his duties, and thus the refusal by the court to allow defense witnesses to testify in Serbia on this issue becomes critical.

There is also evidence of de facto control, but the evidence is unclear and circumstantial. Knowledge of the bulk of the crimes can be imputed to him because their nature was such that anyone in the vicinity must have known. This element is the most tenuous link. This Opinion cannot state with the certainly required to support a conviction that he had "information in his possession" of the type described in *Delalic* sufficient to impute knowledge to him of the crimes.

---

[151] *Delalic*, *supra*, at par. 238.

VI. Domestic Legal Issues on this Appeal

A. Violation of Art. 364 (1) (1) LCP – Improper Composition of Panel.

The combination of a substitution of a lay judge, and a 31-day gap in which no trial hearing was held, resulted in a violation of Article 364(1)(1), which requires a remedy by this court.

Article 305 (1)(3) LCP provides:

> If the adjournment has lasted longer than one month, or if the trial is being held before another presiding judge, the main trial must recommence from the beginning, and all evidence must again be presented.

Article 305 (1)(1) LCP provides:

> that a trial which is adjourned must recommence if the membership of the panel has changed, but after the principals have been examined, the panel may decide that in such a case the witnesses and experts shall not be examined again and that a new on the spot inquest shall not be performed again, but that the testimony of witnesses and experts given in the previous trial shall be read….".

Consequently while the law permits the possibility for the continuation of the main trial without the need to recommence, this occurs only "after the principals have been examined." Interestingly, legal authority Branko Petric in his commentary[152] states that it is acceptable in practice and in accordance with the intention of the law to "renew" the earlier main trial by reading the record when only a single member of the panel was changed. Apart from these two exceptions, however, the provisions of Art. 305 are clearly mandatory as regards the court's obligation to recommence the trial.

The main trial of Trajkovic was adjourned on December 8, 2000, Friday, and the next trial date was January 9, 2001, when the main trial

resumed with the same parties. This in itself is arguably a violation, since one month has been in other cases interpreted to mean e.g., Dec. 8 to Jan. 8. However, there is no need to rule on this issue, since on January 9 there was also change in the composition of the trial panel, when a lay judge was substituted. The Lay-judge Ismet Jakupi was unable to continue and was replaced by lay judge Tefik Muji. [153] The problem arises from Tefik Muji's absence from the trial previously, during the period of November 24-27, when he was acting as an alternative lay judge. So lay judge Muji could not be used as a substitute on January 9, since he was himself not competent to act as a lay judge due to missing the trial days in November.

Therefore, this was in itself a violation, and in combination with the more than one month adjournment, a violation, because it was not a legally-constituted panel on the 9th of January. There is no indication from the trial transcript that upon the resumption of the trial on January 9, 2001 with a reconstituted trial panel, that the court complied with the provisions of Art 305 LCP by restarting the trial, or that it even adopted the accepted practice of reading the record of the main trial.

By January 9th, only some of the witnesses had given evidence and a further eighteen witnesses were scheduled to testify.[154]

Consequently the court appears to have committed an essential violation of the provisions of criminal procedure as foreseen in Article 363 (1) and 364(1)(1 and 3). Its failure in this respect has further far-reaching consequences. At minimum, by committing such a violation of criminal procedure, the evidence presented before the court between Nov 24th

(…continued)

152 Commentary on the Yugoslav Law on Criminal Procedure, 3rd Amended Edition, Bk 1.

153 Tefik Muji had sat on the panel as an alternate judge but had himself been obliged to withdraw from the trial on Nov 24th 2000 but he rejoined the panel again on Nov 27th 2000.

154 The Presiding Judge had drawn up a detailed list of witnesses to be examined on a daily basis.

2000 and Nov 27th 2000[155] (in the absence of lay-judge Tefik Muji) is and should have been rendered inadmissible. Paradoxically however, it is clearly evident that the evidence given by the various witnesses during this period, was taken into consideration by the trial panel when reaching it conclusions and verdict, since the defendant was found guilty of three separate counts of war crimes (and crimes against humanity) committed against Hadjer Ramnabaja, Xhemajl Limani and Haqif Demolli[156] By failing to disallow this evidence and by ultimately considering this evidence in order to reach a determination, the court committed a further essential violation by using evidence which should not have been used as the basis to the verdict, thereby justifying the challenge to the verdict.[157]

Under the plain words of the law, however, this "essential violation" of criminal procedure, per LCP Art. 364(1), can also be used in itself as justification for reversal. This Opinion also agrees with the argument on this issue as raised by the Defense Appeal.[158]

B. Violation of Art. 364 (1) (8),(11) LCP – Improper Conviction for Attempted Murder

Article 351, as incorporated by Article 357(4), requires the court below to cite "the facts and circumstances which constitute the features of the criminal act and those on which the application of the particular

---

155 Evidence was given during this period by Hadjer Ramnabaja, Fatime Shillova, Xhemajl Limani, Haqif Demolli and Nazmije Veseli.

156 On 11 April 1999 (arson), 17 April 1999(injuries with firearms) and 17 April 1999 (kidnapping/maltreatment respectively.

157 Art 364 LCP list instances amounting to essential violations of the provisions of the criminal procedure and Para (1) point 8 provides that it shall be a violation "if the verdict is based on evidence which may not be used as the basis of a verdict under the provisions of this law, unless in view of the other evidence it is obvious that the same verdict would have been rendered even without that evidence."

158 Appeal of Dragana Markovic, April 2, 2001, in the section entitled "AD 1" headed Violation of the item 1 of Par 1 of Article 364.

provision of the criminal law depends." The verdict for Attempted Murder does not follow the law and is thus an essential violation under Art. 364. This conclusion is supported by the following independent reasons.

First, there is no indication that the court considered the *mens rea* of the accused while firing, an essential element to the crime. The verdict reads, *"*the facticity of the act is established on the basis of the injuries.*"* This may prove the *actus reas,* but not the *mens rea,* especially where as here the injured party sustained injuries to the right leg which were not life threatening. It was illogical therefore to base the conviction on the injuries alone. While it is true the court could have based its finding of intent to kill based on the overheard statement of the accused, which the verdict stated as: "I can't imagine how it's possible that someone can put up an Albanian flag in the middle of the day", the verdict reasoning did not state such. The reasoning cannot simply be a statement of facts; the court must state if it believed the words [if said] were circumstantial evidence of intent to kill [as opposed to frighten], and then explain why so. The court did not make any mention of its reasoning in finding an attempt to kill, as opposed to injure, or to frighten. This can be the difference between attempted murder and KCC Art. 157 general danger and a minor offense of shooting firearms without permission.

Second, the court does not explain in any way its confusing verdict statement, "with the correction that the shots came from the window above the street and not from the balcony." This "correction" contradicts the victim's and one of the two witnesses' statements, which testified that the shots came from, and the accused was shooting from, the balcony.[159]

The verdict reasoning also stated, "[T]hese statements were checked during the January reconstruction on the spot which proved that it was possible to shoot from the window of the Trajkovic's

---

[159] See the testimony at trial of Mevlud Fazliu (Injured Party; stated accused shot from balcony), Arif Pireva (accompanied the injured; stated accused shot from a window), Xhevdet Krasniqi (Neighbor of the accused; stated accused shot from the balcony).

apartment towards the victims." [160] That 2 of 3 testified that the balcony, not the window, was the critical spot from which the shots were fired, when combined and the verdict's studiously ignoring the possibility of shooting from the balcony in this statement, can be inferred as a negative finding on the balcony as a shooting platform. It also does not explain why the majority of testimony [2 of 3 who testified as to the location of the shooter] is ignored or why the court states such a "correction." The closing argument of the public prosecutor also refers only to the balcony,[161]

Third and last, the court did not discuss why it chose to believe the witnesses and not the defense alibi witness and the accused, that is, why after evaluating and comparing the evidence it chose to believe the victim and supporting witnesses. The verdict only stated, "the testimony produced by the defense about the presence of the accused in another place at the time of the incident cannot be considered as reliable." This is circular reasoning and does not meet the legal requirements. Without explaining why, the court states it cannot consider the defense evidence as reliable because assumedly it chose to believe the victim and two other witnesses. But the court never explains the reasons for its choice, and thus violates the law.

---

[160] Unfortunately, the Panel recorded no notes regarding the results of the reconstruction on 15 January 2001. The Public Prosecutor in his closing did note that "after some consultations only half of the group was allowed to inspect the crime scene. There also, the witnesses showed in a concrete way the manner in which the criminal act was executed. The entire statement of this witness matches the statement of the injured Mevlud about his wounding, as well as the statements of witnesses Arif Pirevë and Xhevdet Krasniqi." In fact, given the statement of the verdict reasoning on the window, this was not true.

[161] "…Arif Pireva, Xhevdet Krasniqi who described in detail the time, place and the way this criminal act was committed. The factual situation was also verified by witness Mevlud Fazliu who together with the other two have stated during investigations, as well as during the main session, that they saw the accused in the terrace of the building where he was living. After the Albanian flag was placed, because of the anger for the placing of this flag, he directed the gun in the direction of the injured and a projectile struck the injured…". The window is not mentioned in the closing argument.

This Opinion also joins the argument regarding this issue in the Defense Appeal.[162]

C. Violation of Art. 364 (1) (8) LCP – Improper Conviction for Weapons under Art. 199(3) KCC

The Court found the accused in violation of KCC Art. 199(3) based on his statement made to the court made after the court read out the statement made to the investigative judge by US KFOR solider Bryan Hunlock.[163] The court then explains in its reasoning that it chose to disbelieve the exculpatory facts given by the accused based on the evidence of US KFOR solider Bryan Hunlock.

This is a violation of procedure, as LCP Article 333 allows such a panel decision::

(1) only in the following cases:

1) if the persons examined have died, have become mentally ill or cannot be found, or if their appearance before the court is impossible or very difficult because of age, illness or other important causes;

2) if witnesses or experts refuse to present testimony in the main trial without legitimate cause.

Even if a KFOR soldier's absence from Kosovo met the requirement of "very difficult because of …other important causes," the court was required to make such an explicit finding, and it did not. The statement in trial, that " The Court decides to read out the statement of the witness Bryan Hunlock who is no longer present in Kosovo and returned to the United States of America," is insufficient. There is no finding that the

---

162 Appeal of Dragana Markovic, April 2, 2001, in the section entitled "AD 3" headed "Verdict of attempted murder – insufficient detail/contradictions."

163 The record merely states "The Court decides to read out the statement of the witness Bryan Hunlock who is no longer present in Kosovo and returned to the United States of America."

court attempted to subpoena or request the soldier's presence through KFOR, and other soldiers of KFOR have been brought back from the UK and other countries through such requests.[164] The court cannot assume that mere absence from Kosovo is sufficient to justify the reading of a witness' statement to the investigative judge in every case; each case must be examined upon its own facts.[165]

The court failed to make a specific finding or to examine the foundational facts necessary to proving such unavailability, and thus it should not have used the testimony of witness Hunlock to confront the accused, nor to consider as evidence of the falsity of the accused's exculpatory explanation. Moreover, a conviction based only upon evidence of an admission or confession, without any more evidence, cannot stand. Without soldier Hunlock there is no proof of any weapons except for the statements of the accused. For all of these reasons, this Opinion agrees with the argument of the Defense Appeal.[166]

This Opinion regarding the misuse of Article 333(1) also applies *mutatis mutandis* to the use of the testimony of witness Lulzim Kryeziu regarding the alleged May 11 murder of victim Nevzat Kryeziu.

D. Violations of Art. 366(1), 364(2), and 363(3) LCP – Failure to Use Legal Provision to Establish Decisive Fact Affecting Judgment

---

164 *E.g.,* two UK soldiers in the Gjilan case prosecuted by the International Prosecutor of this Office: HEP No.: 178/2000, against Saqip Ibrahimi *et al.*, were returned from the UK to Kosovo to testify in trial..

165 *E.g.,* "Impossible or significantly difficult attendance is a factual issue of each individual case, and it must be assessed from the standpoint of objective possibilities of appearing before the court. If the witness is employed in a distant country and may not obtain a leave, that represents a significantly difficult attendance, which justifies the reading of the statement of such a witness (as in the Supreme Court of Serbia, Kz. 34/56 dated 27 April 1956)." Branko Petric: Commentary on the Law on Criminal Proceedings, 1982 ed.

166 Appeal of Dragana Markovic, April 2, 2001, in the section entitled "AD 3" headed "Verdict of attempted murder – insufficient detail/contradictions."

The accused's conviction by the court of both war crimes and crimes against humanity could only be based upon command responsibility liability. Yet the authority and control, *de jure* and *de facto,* was established primarily by the testimony of one witness, a former police officer Ramizi, as was discussed *supra*. The conflicting testimony of the accused was disregarded (and not discussed in any depth). Yet there were witnesses proposed by the defense who could have been dispositive, who were not examined.

The four witnesses proposed by the defense included his colleagues[167], and the court apparently thought so, as it stated it had decided to call them as witnesses, thus agreeing to the defense proposal and agreeing impliedly to the witnesses' relevance to the proceedings.[168]

However, the witnesses did not appear, and there was apparently no service of the summons which were attempted to be served through the UNMIK Department of Judicial Affairs, although the court believed the witnesses were put on notice by a telephone call.[169]

The defense then proposed that the court "transfer jurisdiction"[170] to the Serbian Court of Vranje.[171] The prosecution stated, "I object to this

---

[167] Filic Branamir, (the former head of the Municipality In Kamenica during the war), Jankovic Radova (Deputy Director of the Secretariat for Internal Affairs in Gjilan during the war), Milloshevic Tihomir (the defendant's next-door neighbor who allegedly left the weapons in his flat), and Stevanovic Dragolub (from the village of Kolloleq). At 184-186, on 26.01.2001. The defense attorney on 15.01.2001 at 183 described the proposed witnesses as: "Filiq Branimir should be questioned, the former head of Kamenica, Dragolub Stevanovic, Jankovic Radova, Deputy Director of SPB in Gjilan because we don't know where Gavranici is and he can tell us about the director's authority. Milosevic Tihomir (Tika, in normal circumstances should be heard in the District Court of Beograd, but he will come to Vrajë, if not we will withdraw this proposal.).

[168] "[The court] has decided to call the witnesses requested by the defense counsels and who are: Branimir Filic, Dragolub Stefanovic, Radovan Jankovic and Tihomir Milloshevic (Tika) who are not hear today because they are in Serbia. The summons are sent through the Department of Judicial Affairs in Pristine." *Id.*

[169] The witnesses do not have details that they have received the summons for this session, but Mrs. Lawyer Gjurishic said that she had phone contact with the four witnesses and they have been informed that they were called as witnesses.

[170] This Opinion assumes that this is a reference of sorts to LCP Article 330(1), since this would be the method for the court in Kosovo [under the laws of 1989] to take witness testimony in Serbia for use in the autonomous province of Kosovo. Such could be done by the Presiding

(continued…)

proposal and we cannot question them through a transfer of jurisdiction in Vranje – I object to this proposal." No explanation of this assertion was provided, nor did the court ask for any. The court then recessed, and announced its decision:

> Article 330, paragraph 1 of LCP, foresees that if a witness never questioned before was called, but can not come, the president of the panel can decide to question the witness in the location where they are. In this case we do not have any reason for their absence because they have refused to come in the District Court of Gjilan. With regard to the public prosecutor, he can not be present in Vranjë, so the questioning of the witnesses will not be correct and in accordance with the law. [172]

This Opinion does not find the stated reason justifies the court's refusal, especially since only 11 days before, the court stated, "…we [the court] found information from the Judicial Department in Pristina stating that the Serbian authorities are ready to cooperate with us, particularly for this case. I [the Presiding Judge] propose going to Vrajë to introduce the questioning of the witnesses."[173] On that day of the 15th of January, the prosecutor had objected to the court's proposal, on the grounds that he had seen a witness, Jankovic, in the village Ranillug, that the witness was not in danger and that he chose not to come before the court due to opposition to KFOR and NATO.[174] The court then reversed itself:

(…continued)

Judge or judge appointed from the Gjilan Court, or by an Investigative Judge in from the jurisdiction of Vranje, according to paragraph 1.

[171] Mr. Jokanovic, the defense attorney, stated, "and if they do not come then the panel is obliged to decide that these witnesses be questioned through a transfer of jurisdiction in front of the District Court of Vranje, normally in the presence of the parties who so wish."

[172] At 184-186.

[173] At 183, stated by the P.J. on 15.01.2001.

[174] *Id.* "I object to all of these proposals because I have personally seen Jankovic in the village of Ranillug and he does not come in front of this panel on purpose because he considers this panel and the forces of KFOR and NATO as occupants. This is why I object and the panel can decide on this. Jankovic is not in danger and he can come here freely….. I am surprised that the defense finds it reasonable for a witness to give a statement without the presence of the prosecutor." The court did not ask for specifics as to the factual basis of the prosecutor's knowledge, nor ask WHY he assumed he would not be present..

> it is necessary to have these four testimonies in the presence of the prosecutor and of the defense in accordance with the law. We decided to summon the four witnesses again, to bring them from the administrative border Kosovë-Serbia and to take them again to the border through KFOR.

The final above-quoted decision 11 days later states again as a justification that the public prosecutor "could not" be present, which did not logically follow from the prosecutor's earlier objection and assertion that "we cannot question them." Furthermore, that "the questioning of the witnesses would not be correct" did not logically follow, if the procedure of Art. 330(3) were applied, as there would seem to be no hindrance to the prosecutor or the selected judge. Moreover, if the prosecutor chose not to attend, that would not prevent the court from considering the evidence, as stated by Petric, Article 330's "provisions foresee the necessary departing from the principle of directness, whereby the statements of witnesses or experts, important for the decision, should be secured."[175] Nor can the prosecutor attempt to sabotage the taking of testimony by refusing to appear.

The court may well have had good reasons, but unfortunately it did not state them in the record, and without any other statements by the court, this Opinion finds error in the stated reason for denying the defense requests.

The court proposed the procedure, and only the prosecutor's admonition regarding his anticipated non-appearance, along with rhetoric on parallel systems and the witness purposefully snubbing KFOR are stated in response. This is insufficient. While the witnesses could indeed have been protected by UNMIK Police and KFOR if met at the Kosovo-Serbia administrative boundary, as suggested by the court, the fact is they chose not to do so. The court was bound, where the possibly exculpatory testimony on the critical issue of command responsibility was

at stake, to take all reasonable steps to obtain that testimony. This might have included taking the testimony at or near the boundary under provisions of LCP Art. 280, or using Art. 330 to take it in Serbia, as the court stated the Serbian authorities were willing to cooperate. The experience of the Kosovo judiciary since January 2001 has seen several such sessions in Serbia to take witness statements, and the need to "establish with an equal attention both those facts the accused is charged with and those facts, which are in his favor," as required by LCP Art. 15(2), required reversal of the convictions for war crimes and crimes against humanity in order to allow these witnesses to be examined.

This Opinion is therefore in agreement with the Defense Appeals on this issue.[176]

E. Violations of Art. 363(3), 364(1)(11), 366(1) LCP – Failure of the Verdict to Cite the Reasons Concerning the Decisive Facts, where there is a Considerable Discrepancy between the Cited Facts and the Facts in the Testimony, and Failure to Establish Decisive Facts.

Both Defense Appeal Briefs extensively discuss the verdict's failure to discuss in any depth the individual testimony of the witnesses, where there are contradictions or inconsistencies. This Opinion will not repeat those arguments, but notes only here that the Verdict reasoning does not discuss most of the witness testimony as required by law, and even when it does refer to some testimony, it does not compare it with and explain why it chooses to grant credibility to the witnesses it chooses to believe.

As one example, which is also in violation of LCP Article 351(1) as made applicable by 357(4), even though the accused is convicted of a

(…continued)

[175] Petric, Commentary of the Law on Criminal Procedure, 1988 Edition.

multiplicity of war crimes (and crimes against humanity) committed on 18 April 1999, the court merely summarized these, citing them as "creation of panic and terror and eviction of civilian population in villages of Strezovc, Leshtar, Rahovice, Krileve, and murder of Ahmet Mehmeti, Arsim Isufi, Shemsi Isufi and Ramadan Kastrati. Reason: it was a planned and organized action, committed by a number of forces, especially police forces." Considering the number of witnesses (nine) that gave evidence which was contradictory as to the alleged perpetrators of these incidents, and the facts involved in proving the elements of each crime, it was incumbent on the court to expand upon its reasoning, which it did not do.

F. Defense Appeal Arguments of No Merit.

This Opinion disagrees with many of the Defense Appeal contentions, which do not rise to the level of violations requiring reversal.

1. Translation and the Missing Page. Attorney Markovic argues that the translation of the verdict was not in Serbian (but in a language that resembles Serbian) and that many of facts listed in Serbian did not correspond to the English. Further more it claims that page 7 of the verdict was missing and that the defense was prevented from adequately stating the appeal. First, the translation was prepared by a Croatian translator , and the differences between Croatian and Serbian are minute, and no examples are provided (and are similar to the difference between American and British English). The other appeal lawyer, Stoja Duricic was able to read and understand it in order to compile an appeal. Second, if the page was so missing, counsel could have contacted either the Prosecution or Court registry, either personally or by telephone, e-mail or

(…continued)

[176] See Appeal of Dragana Markovic, April 2, 2001, in the last para. of the section entitled "AD 3"; and Appeal of Stoja Duricic, March 29, 2001, entitled "Wrong or Partially Estimated Factual State."

telefax, for the purpose of obtaining a copy of the "missing" page, or obtained it from co-counsel Duricic.

2. Failure to cite which code. The verdict states: "Article 30 par. 1 in connection with Article 19 of the Criminal Law of Yugoslavia" as the basis for the conviction for attempted murder. Attorney Markovic argues the court attempted to convict the accused under Article 30 of the FRY Criminal Code, when it is patently obvious in all previous stages of the proceedings and the indictment, as well as from the defense examination of witnesses, that the accused was being tried for attempted murder pursuant to Article 30, para. 1 of the Kosovo Criminal Code in connection with Article 19 of the Criminal Law of Yugoslavia.

3. Failure to Properly Question and Limit Prosecution Questions. Defense Attorney Markovic also argues that the court did not properly start the questioning of witnesses, and did not properly limit the prosecutor's questioning. "The prosecutor was allowed to question the witness, Ramizi, about circumstances that were not related in any way with the event for which the accused, Trajkovic, was accused."[177] The complained-of questioning was introduced to rebut the accused's consistent assertions that he was not a person with authority, and that he did not have any grievances against the Kosovar Albanians. To establish this, the witness gave evidence of his experiences with the accused. Article 322 LCP provides that "the presentation of evidence shall pertain to all facts which the court deems important to the proper rendering of a verdict." It is clear from the trial transcript that the court considered the evidence important as it disallowed the objections.[178]

VII. Crimes Against Humanity as Separate and Independent Violation than War Crimes under 142.

---

[177] See Appeal of Dragana Markovic, April 2, 2001, in the last para. of section entitled "AD 3".
[178] At 166.

The Verdict found the accused guilty of both war crimes under Article 142, and crimes against humanity. If the finding of guilt for crimes against humanity is simply used to prove one element of Art. 142, being the phrase "Whoever in violation of rules of international law…," then the only punishable crime is war crimes. Alternatively, if the court did and could directly apply the customary international criminal law of crimes in the Gjilan District Court, the accused could be punished for crimes against humanity [CAH] [which, for example, occurred during a period of non-conflict]. This Opinion agrees with the legal possibility of the former[179], but disagrees with the legal possibility of the latter. But the verdict reasoning contains support for both. It confusingly asserts that it must "declare the accused guilty of crimes against humanity, on the grounds of Article 142," which implies the former "proving an element of war crimes" use of CAH. Yet it also refers to its "Determination of the sentence for crimes against humanity," which implies the direct application of international customary law. Accordingly, we will assume *arguendo* that the verdict did the latter, direct application. Regardless, this Opinion concludes that the accused cannot be guilty of crimes against humanity [CAH] because:

1. No command responsibility was proven. CAH liability for the accused must rely upon command responsibility, which was discussed in detail *supra.* No convincing evidence exists to so find the accused liable.

2. Widespread or systematic attacks requirement not sufficiently supported by the verdict. The verdict states the CAH requirement of "widespread or systematic plan of attack," but then the verdict fails to properly articulate the facts upon which it relies, nor does it analyze the individual witness testimony. The comments in this Opinion provided

---

179 Such "violations of international law" could be customary international [criminal] law, international instruments [treaties, conventions] to which Yugoslavia was a party, and UN Security Council Resolutions, for example.

supra regarding the requirements of law for such specificity in a written verdict apply as well to CAH. Certainly this unsupported statement is insufficient under the Law on Criminal Procedure and articles on verdict requirements discussed *supra:*

> According to the facts pointed out previously, there are sufficient evidences that Momcillo Trajkovic committed the acts that he is charged with, in time of war (characterized by going in the conflict of the international NATO armed forces), against the civilian population and within a concerted plan aiming systematic atrocities of which he had a complete knowledge.

3. Direct Application of CAH into Kosovo District Court is not valid.

In light of this Opinion's conclusions regarding other issues, there is no need to delve here into the legal reasoning supporting this Opinion's rejection of any direct application of CAH to domestic Kosovo courts. The issue continues to be controversial, and national courts have held both ways. Legal commentators remain split on the issue.[180]

Opinion by:

Michael E. Hartmann

International Prosecutor for the Office of the Public Prosecutor of Kosovo

---

[180] For an excellent review of the legal arguments of both sides, *cf.* Michael Bolander's article, Direct Application of International Criminal law in Kosovo, which reviews the judgment in this case, in the first issue of the periodical Kosovo Legal Studies, Vol. 1, 2001/1, with Direct Application of the International Criminal Law, The Crime Against Humanity, by Marie-Anne Swartenbroekx, Deputy Prosecutor, Brussels, Brussels, 1995 [article in electronic form available from thisOffice]. This Office also has prepared a draft Opinion on this issue, but in light of the already-massive size of this Opinion, it will not be attached, but is available to the parties or court as a courtesy upon request.