DECISIONS OF INTERNATIONAL TRIBUNALS

Edited by Malcolm D. Evans*

I. The *Southern Bluefin Tuna* Arbitration
II. Command Responsibility and the *Blaskic* Case

I. THE *SOUTHERN BLUEFIN TUNA* ARBITRATION

A. The Issues

Readers of last October's I.C.L.Q. will recall that this case started life in the International Tribunal for the Law of the Sea when Australia and New Zealand were granted provisional measures against Japanese high seas tuna fishing in the Pacific.[1] That Tribunal had held that the provisions of the 1982 UN Convention on the Law of the Sea ("1982 UNCLOS") invoked by Australia and New Zealand appeared to afford a basis on which the jurisdiction of an arbitral tribunal might be founded; that the fact that the 1993 Convention on Conservation of Southern Bluefin Tuna applied between the parties did not preclude recourse to the compulsory dispute settlement procedures in Part XV of the 1982 UNCLOS; and that an arbitral tribunal would *prima facie* have jurisdiction over the merits of the dispute.[2] Notwithstanding this necessarily provisional view, when the parties then proceeded to arbitration, Japan maintained its initial preliminary objections, and the award handed down in August 2000 thus deals only with the jurisdiction of the arbitrators.[3] The facts and background to the case are set out in the earlier case-note and need not be repeated here.

This arbitration is the first to take place under Annex VII of the 1982 UNCLOS. Arbitration is compulsory where none of the parties to the dispute has made declarations under Article 287 of the Convention choosing any other procedure. Japan argued, however, that this dispute arose under and should be settled solely in accordance with the 1993 Convention on the Conservation of Southern Bluefin Tuna ("1993 CCSBT"). That agreement did not provide for compulsory dispute settlement, and according to Japan, by becoming parties to it Australia and New Zealand had precluded themselves from referring the same matters for arbitration under the 1982 UN Convention. Alternatively, Japan argued that the

* The aim of this section is to survey, on a selective basis, some of the more important decisions of international tribunals.

1. Churchill, The Southern Bluefin Tuna Cases, 49 I.C.L.Q. 979 (2000). See also articles by various authors in 10 Ybk. Int. Env. L (1999), and Kwiatkowska, The Southern Bluefin Tuna Cases, 15 I.J.M.C.L. 1 (2000).

2. Southern Bluefin Tuna Cases (Provisional Measures), ITLOS Nos. 3 and 4 (1999), at paras 52–62.

3. The arbitration was held at ICSID. For the full text of the award and the pleadings see the World Bank website at www.worldbank.org/icsid.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

parties' declarations accepting the compulsory jurisdiction of the ICJ took precedence over arbitration under Article 282 and that in any event attempts to settle the dispute had not been exhausted. Japan also put forward a number of objections to admissibility, arguing that the dispute was essentially about science rather than law, and that the claimants had failed to identify a cause of action.

B. The Decision

The arbitral tribunal held that there had been adequate efforts to negotiate a settlement, that there remained a legal dispute between the parties concerning the interpretation and application of both the 1982 UN Convention and the 1993 CCSBT, and it also rejected Japan's contention that the 1993 Convention should be treated as a *lex specialis*. Obligations under UNCLOS co-existed with and could determine the interpretation of the CCSBT, so that the dispute, "while centred in the 1993 Convention, also arises under the UNCLOS".[4] However, on the central issue of jurisdiction, the arbitral tribunal, from whose award only Sir Kenneth Keith dissented, found in favour of Japan on the ground that, by entering into the 1993 CCSBT, the parties had "preclude[d] subjection of their disputes to section 2 procedures in accordance with Article 281(1) [of UNCLOS]".[5] Since it thus lacked jurisdiction to rule on the merits of the case, the arbitral tribunal also revoked the provisional measures imposed in the earlier proceedings. The reasons for this denial of jurisdiction, which is likely to remain controversial, are complex, and they have significant implications not only for law of the sea disputes but also for other treaty dispute settlement systems.

C. Commentary

Two findings are central to the tribunal's conclusion. First, notwithstanding its acceptance of the applicants' argument that the dispute raised issues under both treaties, the tribunal saw it as "artificial" to separate the UNCLOS elements from the broader dispute "centred" on the 1993 Convention, although it did accept that there might be exceptional cases where such a separation is possible. Secondly, starting from the perspective that they were essentially faced with a dispute concerning the 1993 CCSBT rather than UNCLOS, the tribunal then considered whether Article 16 of the 1993 Convention met the terms of Article 281(1) of UNCLOS. That provision excludes from compulsory jurisdiction any case where the parties have agreed to seek settlement of an UNCLOS dispute by other means unless "no settlement has been reached by recourse to such means and the agreement … does not exclude any further procedure". Article 16 does not in terms exclude any further procedure, but in one of the more unusual exercises in creative treaty interpretation by an international tribunal, the arbitrators noted that Article 16 was based on Article XI of the 1959 Antarctic Treaty, and found it

4. At para. 52.
5. At para. 63. The relevant part of UNCLOS Art. 281 (1) reads:
   If the States parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and *the agreement between the parties does not exclude any further procedure* … . (emphasis added).

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

"obvious that these provisions are meant to exclude compulsory jurisdiction".[6] They supported this interpretation by reference to the number of other post-UNCLOS treaties which also make no provision for compulsory dispute settlement, and by the assertion that Article 281 allows States to limit UNCLOS compulsory jurisdiction by agreement. There are two problems with this view of Article 281.

First, the fact that other agreements, even post-UNCLOS, make no provision for compulsory jurisdiction tells us nothing about the parties' intention with regard to the settlement of UNCLOS disputes. It is entirely obvious that Article 16 of the CCSBT is meant to exclude compulsory jurisdiction over disputes *under that convention*, but it is far from obvious that it is meant also to exclude compulsory disputes under UNCLOS. With all due respect to the learned arbitrators, this assertion simply lacks conviction.

Secondly, it is *prima facie* curious to use Article 281 to explain the relationship between the 1993 CCSBT and the 1982 UNCLOS Part XV. The more obvious article on which to rely for this purpose is Article 282, under which dispute settlement procedures of other agreements apply in lieu of UNCLOS Part XV, provided they entail *a binding decision*.[7] Of course Article 16 of the 1993 CCSBT does not entail such an outcome, so it could not have deprived the arbitrators of jurisdiction in this case, hence the implausible resort to Article 281.

But what is the effect of the tribunal's creative reading of Article 281, taken together with the unambiguous terms of Article 282? Under Article 281 a regional agreement which makes no provision for compulsory binding settlement of disputes will apparently exclude resort to UNCLOS Part XV on the assumption that that is what the parties intended. Under Article 282 a regional agreement which makes provision for compulsory binding dispute settlement will also exclude resort to UNCLOS Part XV. These two articles could thus be reduced to a single simple proposition: regional agreements exclude UNCLOS dispute settlement. But if that is the law, why then does UNCLOS need two articles to achieve what could be expressed in one sentence? The obvious answer is that Article 281 was never intended to have the meaning attributed to it in this case.

6. At para. 58. The relevant part of CCSBT Art. 16 reads:
   1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
   2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
7. UNCLOS Art. 282 reads:
   If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails *a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part,* unless the parties to the dispute otherwise agree. (emphasis added)

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

The context for which it seems more appropriately designed is one in which the parties to an UNCLOS dispute are seeking a negotiated settlement and agree to resort, for example, to conciliation. If this does not result in settlement, then the parties would remain free to resort to UNCLOS procedures unless they had agreed otherwise. Even if Article 281 were intended also to cover dispute settlement clauses in agreements such as the 1993 CCSBT, one comes back to the question: how is it possible to read into one agreement (the 1993 CCSBT) an intention to preclude resort to compulsory procedures in the event of disputes arising under another agreement (the 1982 UNCLOS)? Or, put another way, where is the justification for reading Article 16 of the 1993 CCSBT as applying both to disputes under that agreement and to disputes under UNCLOS? The arbitral tribunal offers none, save for its vague assertion that Article 281 so intends, and its reliance on those other treaties which also make no reference to UNCLOS, and which tell us only how the parties intend to handle disputes arising under those same agreements.

The core of the problem is the reluctance of the arbitrators to treat the case as raising UNCLOS issues separate from the CCSBT. There is no doubt that the case is about high seas fishing, and that there are relevant and applicable articles of UNCLOS,[8] as the ITLOS observed in the earlier proceedings. There is equally no doubt that, but for the CCSBT, a dispute concerning the interpretation or application of those articles would have fallen within UNCLOS Part XV compulsory jurisdiction. On the facts of this case, such a dispute, confined to the application of UNCLOS, might well have led to failure on the applicants' part to show a violation of the Convention, but that does not mean there is no UNCLOS dispute or that UNCLOS has no further relevance for parties to the CCSBT, as the arbitral tribunal itself admits. What the arbitrators may have believed is that they could not decide the UNCLOS issues without also deciding on interpretation and application of the CCSBT. Since it clearly had no jurisdiction over disputes concerning the latter, the tribunal may have felt unable to decide any other issues, including those concerning UNCLOS, which could not be separated. This would be a defensible position under a treaty which by no means makes binding settlement compulsory for all disputes and under which issues subject to jurisdiction may well be bound up with others which are not.[9] In effect an UNCLOS tribunal would then be required to deny jurisdiction over any of the issues unless it had jurisdiction over all of them. If the case can be understood in this way then its implications for dispute settlement would be important, but also consistent with the overall scheme of Part XV. But the tribunal makes no reference to any such principle of inseparability in justifying its dismissal of the case, apart from pointing to the "artificiality" of treating such a case as an UNCLOS dispute. What their view would be if the point were put directly can only be guessed.

On the other hand, if the inseparability of the UNCLOS issues is not the basis of this judgment, then the outcome is much more questionable. The arbitrators would then simply be reading Part XV of UNCLOS as impliedly subject to

8. 1982 UNCLOS, Art. 64, 116–119.

9. See Boyle, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction (1997) 46 I.C.L.Q. 37–54.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

subsequent regional agreements, and as taking out of compulsory settlement any case which raises matters concerning both UNCLOS and another agreement on which the dispute is "primarily centred". Such an outcome should cause high seas fishing States to pause before entering regional fishery agreements which have no compulsory dispute settlement clause. If they do participate in such agreements they will stand in danger of losing the protection from coastal State "creeping jurisdiction" which Part XV of UNCLOS at present provides in respect of high seas fishing. The irony in the present arbitration award is that it would appear also to deny Japan access to compulsory dispute settlement if Australia and New Zealand were to assert jurisdiction over Japanese tuna fishing on the high seas for the purpose of enforcing or making more effective the 1993 CCSBT. Since Japan, like the European Community, depends heavily on distant water high seas fishing rights, the outcome of the arbitration looks very much like an own goal which it may yet regret. From this perspective the arbitral tribunal's belief that they have ensured an appropriate balance between the rights of coastal and high seas fishing States may seem a little naïve. Moreover, it is far from certain when a dispute is "primarily centred" on one treaty rather than another. Can there be disputes which have no primary centre in either treaty? Was the recent dispute between Chile and the EC over swordfish stocks primarily centred on UNCLOS, or on GATT, or was it really two separate disputes rolled into one?[10] The arbitral tribunal's reasoning, rather than its actual conclusion, has opened up a minefield of uncertainty and confusion which it is probably going to take an authoritative judicial decision to unravel.

A further irony, of which the tribunal was well aware, is that once, or if, the 1995 Agreement on Conservation of Straddling and Highly Migratory Fish Stocks enters into force for the parties to this case, Article 30(2) will import the provisions of UNCLOS Part XV on compulsory dispute settlement into the 1993 CCSBT and other regional agreements. Or perhaps not? Those provisions include Article 281, which as we now know from this award, excludes from Part XV those disputes which also arise under regional treaties with no provision for compulsory dispute settlement. The tribunal conveniently ignores the circularity in its own reasoning when adverting to the benefits the 1995 Agreement will bring to fisheries disputes such as this one.

D. Conclusions

Of course, the decision of the *Bluefin Tuna* arbitrators may simply be wrong, and it is far from certain, given its earlier views, that the International Tribunal for the

10. Chile-EC: *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, ITLOS No.7, Order No.2000/3 (2000). On 17 November 2000 the EC referred elements of the same dispute to the Dispute Settlement Body of the World Trade Organization. Both cases were suspended following an agreement on 24 January 2001.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

Law of the Sea will follow the award's interpretation of Article 281. The case does illustrate that arbitration may not be the best means of addressing UNCLOS disputes. Not only is it very significantly more expensive as a process than going to the ICJ or the ITLOS, but there is, just perhaps, not quite the same institutional commitment to seeing a case through several phases of complex argument. Faced with a merits phase that would turn largely on scientific evidence, and lead only to a negotiated outcome, it is easy to appreciate an ad hoc tribunal's desire to part company quickly with a largely hopeless case that had already been well aired. Moreover, cases such as this are arguably better suited to special arbitration by fisheries experts than by a judicial tribunal with expertise only in legal questions. *Caveat piscator*.

ALAN BOYLE*

II. COMMAND RESPONSIBILITY AND THE *BLASKIC* CASE

A. Introduction

A disturbing feature of the conflict in the former Yugoslavia was the extent to which civilians were the target of military attacks by all three of the armed forces of the main ethnic communities. It was the military attacks by the armed forces of one of these ethnic communities—the Bosnian Croats (HZHB)—against Bosnian Muslim civilians and associated events in the Lasva Valley region of Central Bosnia from May 1992 to January 1994 that led to the indictment and eventual conviction of General Tihomir Blaskic.

The *Blaskic* case represents an historic decision of the UN International Criminal Tribunal for the former Yugoslavia (ICTY). It is the first time since the war crimes trials following the Second World War that a serving General has been found guilty of war crimes.[1] At the time of the commission of the offences, Blaskic was a Colonel in the armed forces of the Bosnian "Croatian Defence Council" (HVO)[2] and Commander of the Central Bosnia Operative Zone (CBOZ) with his headquarters in the Hotel Vitez.[3] He was promoted in August 1994 to the rank of General and was at the same time appointed commander of the HVO with his headquarters in Mostar. Subsequently, in November 1995, he was appointed by the Croatian Government as a General in the armed forces of the Republic of Croatia (HV).[4]

On 1 April 1996, General Blaskic voluntarily gave himself up to the ICTY, five months after being indicted by the ICTY for war crimes. The pre-trial phase of the case lasted 14 months, during which time the Tribunal rendered a number of

* Faculty of Law, University of Edinburgh.

1. See e.g., among these earlier cases *U.S.A.* v. *Von Leeb et al.*, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, p.1; and *U.S.A.* v. *Tomoyuki Yamashita*, United Nations War Crimes Commission, 4 *Law Reports of Trials of War Criminals*, (1945), p.1.

2. The HVO is the military arm of the "Croatian Community of Herceg-Bosna" (HZHB).

3. *Prosecutor* v. *Tihomir Blaskic*, Case No. IT-95–14-T, decision of 3 March 2000, para. 378.

4. *Second Amended Indictment*, 25 April 1997, para. 2.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

pre-trial decisions, the most important of these concerning the competence of the Tribunal under Article 29 of the ICTY Statute to issue binding orders and requests to States and individuals.[5] The trial itself lasted from 24 June 1997 to 30 July 1999 with the Trial Chamber delivering its 270 page judgment on 3 March 2000. General Blaskic was found guilty of 18 counts of grave breaches of the 1949 Geneva Conventions (Article 2 of the Statute), violations of the Laws or Customs of War (Article 3 of the Statute), and crimes against humanity (Article 5 of the Statute), and was sentenced to 45 years in prison.

B. The Crimes Charged

General Blaskic was charged with serious violations of international humanitarian law committed against Bosnian Muslims in the municipalities of Vitez, Busovaca, Kiseljak and Zenica in the Lasva Valley region of Central Bosnia during the period May 1992 to January 1994. The crimes charged can be grouped into six distinct categories. The first was alleged persecution of the Muslim civilian population on political, racial or religious grounds which was alleged to be a crime against humanity[6] (count 1). Second, alleged unlawful attacks on civilians[7] (count 3) and civilian objects[8] (count 4) and destruction that was not justified by military necessity[9] (count 2), all of which were allegedly violations of the laws or customs of war. Third, alleged wilful killing and causing serious physical and mental injury to civilians which allegedly constituted grave breaches of the 1949 Geneva Conventions[10] (counts 5, 8), violations of the laws or customs of war[11] (counts 6, 9), and crimes against humanity[12] (counts 7, 10). Fourth, the alleged destruction and plunder of property during the attacks on civilians and their property which were alleged to constitute a grave breach of the 1949 Geneva Conventions[13] (count 11)

5. *Prosecutor* v. *Tihomir Blaskic, Decision on the Objection of the Republic of Croatia to the issuance of subpoena duces tecum*, IT-95–14-PT, 18 July 1997; and in the Appeals Chamber, *Prosecutor* v. *Tihomir Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 Oct. 1997, IT-95–14-AR108 *bis*. On these decisions, see Sarooshi, D., "The Powers of the United Nations International Criminal Tribunals", *Max Planck Yearbook of United Nations Law*, 2 (1998), p.141 at pp.149–154, 156–158.

6. As recognised by Article 5(h) of the ICTY Statute (persecution on political, racial, or religious grounds).

7. As recognised by Article 3 of the ICTY Statute and customary law, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II (unlawful attack on civilians).

8. As recognised by Article 3 of the ICTY Statute and customary law and Article 52(1) of Protocol I (unlawful attack on civilian objects).

9. As recognised by Article 3(b) of the ICTY Statute (devastation not justified by military necessity).

10. Wilful killing as a grave breach as recognised by Article 2(a) of the ICTY Statute. Wilfully causing great suffering or serious injury to body or health as a grave breach as recognised by Article 2(c) of the ICTY Statute.

11. As recognised by Article 3 of the ICTY Statute and Article 3(1)(a) (murder) and Article 3(1)(a) (violence to life and person) of the Geneva Conventions.

12. Wilful killing as a crime against humanity as recognised by Article 5(a) (murder) of the ICTY Statute. Wilfully causing great suffering or serious injury as a crime against humanity as recognised by Article 5(i) of the ICTY Statute.

13. As recognised by Article 2(d) of the ICTY Statute (extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly).

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

and violations of the laws or customs of war[14] (counts 12–13). Fifth, the alleged destruction of institutions dedicated to religion or education which was alleged to constitute a violation of the laws or customs of war[15] (count 14). Sixth, and finally, was the alleged inhumane treatment of detained civilians, the taking of civilians as hostages, and the use of civilians as human shields, all of which were alleged to constitute grave breaches of the 1949 Geneva Conventions[16] (counts 15, 17, 19) and violations of the laws or customs of war[17] (counts 16, 18, 20). General Blaskic was alleged to be criminally responsible on an individual basis for these alleged crimes pursuant to Article 7(1) and 7(3) of the ICTY Statute.[18]

C. The Applicable Law

The Trial Chamber, having found that there was an armed conflict in existence within the Lasva Valley region of Central Bosnia,[19] then went on to examine the conditions that must be met for Articles 2, 3, and 5 of the Statute to be invoked successfully before the Tribunal. These conditions do not as such flow from the ICTY Statute, but rather from the body of international humanitarian law which the Tribunal is required to apply.[20]

(a) Article 2: grave breaches of the 1949 Geneva Conventions

There are two pre-conditions for Article 2 to be applicable in a particular case: that the armed conflict is international in nature; and that the grave breaches must be perpetrated against persons or property who have "protected" status under the 1949 Geneva Conventions.

The Trial Chamber held that the conflict in Central Bosnia could be characterised as being international in nature due to Croatia's direct and indirect intervention in Bosnia-Herzegovina.[21] Croatia's direct intervention was evidenced by members of the armed forces of the Republic of Croatia (HV) being located primarily in the Mostar, Prozor, and Gornji Vakuf regions (of Central

14. As recognised by Articles 3(b) (devastation not justified by military necessity) and 3(e) (plunder of public or private property) of the ICTY Statute.

15. As recognised by Article 3(d) of the ICTY Statute (destruction or wilful damage to institutions dedicated to religion or education).

16. As recognised by Article 2(b) (inhuman treatment) and Article 2(h) (taking civilians as hostages) of the ICTY Statute. The count pertaining to the use of civilians as human shields was also based on Article 2(b) of the ICTY Statute.

17. As recognised by Article 3 of the ICTY Statute; and Article 3(1)(a) (cruel treatment) and Article 3 (taking of hostages) of the Geneva Conventions. The count pertaining to the use of human shields was also based on Article 3 of the ICTY Statute and Article 3(1)(a) of the Geneva Conventions.

18. For detailed consideration of these provisions, see *infra* Section D.

19. *Blaskic* case, *supra* n.3, para. 64.

20. On the relationship between the ICTY and existing international humanitarian law, see Greenwood, C., "The Development of International Humanitarian Law by the International Criminal Tribunal for the former Yugoslavia", *Max Planck Yearbook of United Nations Law*, 2 (1998), p.97 at p.111.

21. The Trial Chamber applied the decision of the *Tadic* Appeal Judgment (*Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-A, 15 July 1999, para. 84) when it held that "[a]n armed conflict which erupts in the territory of a single State and which is thus at first sight internal may be deemed international where the troops of another State intervene in the conflict or even where some participants in the internal armed conflict act on behalf of this other State." (*Blaskic* case, *supra* n.3, para. 75.)

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

Bosnia) and in a region to the east of Capljina, with proof also of HV presence in the Lasva Valley.[22] The Trial Chamber also found that Croatia exercised a sufficient degree of indirect control over the HVO and HZHB such that they could be said to be acting on behalf of Croatia which in turn internationalised the conflict. The Trial Chamber adopted the controversial decision of the Appeals Chamber in the *Tadic* case[23] which rejected the "effective control" test of the *Nicaragua* case when dealing with military or paramilitary groups and adopted instead the criterion of "overall control".[24] The Appeals Chamber in the *Tadic* case stated: "control by a State over *subordinate armed forces or militias or paramilitary units* may be of an overall character … The control required by international law may be deemed to exist when a State … *has a role in organising, co-ordinating or planning the military actions* of the military group … ."[25] The Trial Chamber in the *Blaskic* case held that the Republic of Croatia exercised such overall control over the HVO and HZHB based on six factors.

The first was the appointment by President Tudjman of Croatia on 10 April 1992 of General Bobetko of the HV as commander of the "Southern Front" with his duties including the command of HV and HVO units in Croatia and Bosnia-Herzegovina.[26] Second was the appointment and promotion either by General Bobetko or more directly by the Croatian Government of a number of HVO commanders, including the promotion of Blaskic to Colonel.[27] Third, that a number of high-ranking officers within the HV went to Bosnia to serve as successive Chiefs-of-Staff in the HVO, all of whom some time later returned to positions in the Croatian army.[28] Fourth, that President Tudjman could order the replacement of persons from the Bosnian Croat civilian leadership who did not agree with his decisions or agenda.[29] Fifth, the Bosnian Croat leaders followed the directions given by Zagreb or, at least, co-ordinated their decisions with the Croatian Government.[30] Finally, the Chamber found that the Republic of Croatia and the HVO shared the same goal of annexing that part of Bosnian territory which they regarded as historically Croatian to the Republic of Croatia.[31] The Chamber found this a relevant factor since the Appeals Chamber in the earlier *Tadic* case held that the threshold of control may be more easily established where "the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls".[32] From a policy perspective this approach of the Appeals Chamber in

22. The Trial Chamber relied on the testimony of a number of witnesses as well as UN reports and documents—including UN Security Council resolutions 752 and 787—which noted an HV presence in Bosnia and Central Bosnia. (*Ibid*, paras 88–90.)
23. Cf. the separate declaration of Judge Shahabuddeen, appended to the Judgment.
24. *Tadic* Appeal Judgment, *supra* n.21, paras 124–125.
25. *Ibid*, para. 137 (original emphasis).
26. *Blaskic* case, *supra* n.3, para. 112.
27. *Ibid*, para. 112.
28. *Ibid*, para. 115.
29. *Ibid*, para. 116.
30. *Ibid*, paras 118–119.
31. *Ibid*, para. 122.
32. *Tadic* Appeal Judgment, *supra* n.21, para. 140 as reproduced by the Trial Chamber in the *Blaskic* case, *supra* n.3, para. 121.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

the *Tadic* case—followed by the Trial Chamber in *Blaskic*—may appear desirable, but it suffers, however, from the lack of an underlying coherent rationale. In particular, there does not appear any logical reason to lower in effect the threshold level of control for the specific reason of "territorial ambition" as opposed to any other such unlawful objective. For example, what about the case where a neighbouring State seeks to achieve other unlawful objectives by means of exercising control over armed forces operating within its neighbour's territory, say, for example, the overthrow of the government of the neighbouring State. Does this also mean that the threshold test of overall control is easier to fulfil in such a case? As a minimum, it would seem that the Appeals Chamber needs to clarify the application of this factor. In any case, the Trial Chamber in *Blaskic* did not need to rely on this aspect of territorial design of Croatia, since there was more than adequate evidence that Croatia exercised a degree of overall control over the HVO.

Having established that the conflict was international in nature, the Chamber then went on find that the remaining precondition for Article 2 to apply—that the victims and property were protected under Articles 4(1) (persons)[33] and 53 (property)[34] of the Fourth Geneva Convention—was also fulfilled. Accordingly, the Chamber considered that the six counts of grave breaches which refer to the following five sub-headings of Article 2 of the Statute were of application *in casu*: wilful killing,[35] inhuman treatment,[36] wilfully causing great suffering or serious injury to body or health,[37] extensive destruction of property,[38] and the taking of civilians as hostages.[39] The general *mens rea* required for commission of any of these offences includes "both guilty intent and recklessness which may be likened to serious criminal negligence."[40]

(b) Article 3: Violations of the laws or customs of war

Article 3 of the ICTY Statute provides for the jurisdiction of the Tribunal to decide on alleged violations of the laws or customs of war. This provision is

33. *Blaskic* case, *supra* n.3, paras 133, 146.

34. The Chamber found that the municipalities of Vitez, Busovaca, and Kiseljak could be characterised as occupied territories and as such the property of Bosnian Muslims in these areas received the protection of Article 53 of the Fourth Geneva Convention which prohibits the extensive destruction of property by an occupying power not justified by military necessity. (*Ibid*, para. 149.)

35. Article 2(a) of the Statute. The *mens rea* "exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death." (*Ibid*, para. 153.)

36. Article 2(b) of the Statute. The Chamber affirmed the finding of the *Celebici* case concerning inhuman treatment which is "an intentional act or omission … which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity". (*Blaskic* case, *supra* n.3, para. 154.) This category includes, e.g., acts such as torture.

37. Article 2(c) of the Statute. This offence is an intentional act or omission causing great suffering or serious injury to body or health, including mental health. (*Ibid*, para. 156.)

38. Article 2(d) of the Statute. The destruction of property to be characterised as an offence must be unjustified by military necessity and must be extensive, unlawful, and wanton. (*Ibid*, para. 157.)

39. Article 2(h) of the Statute. The unlawful act of taking civilians as hostages occurs when civilians are detained in order to obtain a concession or gain an advantage. (*Ibid*, para. 158.)

40. *Blaskic* case, *supra* n.3, para. 152.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

applicable to both internal and international conflicts.[41] The Trial Chamber held that attacks upon persons not directly involved in the hostilities were prohibited by Common Article 3 of the Geneva Conventions and that the norms of this Article being part of customary international law[42] at the relevant time meant that it was law which could be used by the Chamber in deciding whether the accused had committed the following offences under Article 3 of the Statute:[43] unlawful attacks against civilians and civilian property;[44] murder;[45] violence to life and person;[46] devastation of property;[47] plunder of public or private property;[48] destruction or wilful damage to institutions dedicated to religion or education;[49] cruel treatment;[50] and the taking of hostages.[51]

41. *Ibid*, para. 161, and citations to earlier ICTY cases contained therein.

42. *Ibid*, para. 166.

43. *Ibid*, para. 170. The Trial Chamber, moreover, affirmed earlier ICTY case-law that customary international law imposes criminal responsibility on individuals for serious violations of Common Article 3. (*Ibid*, para. 176, and citations to earlier ICTY cases contained therein.)

44. The Trial Chamber requires that the attack must have caused deaths and/or serious injury within the civilian population or actual damage to civilian property. Civilians within the meaning of Article 3 of the ICTY Statute are persons who are not, or are no longer, members of the armed forces. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity. (*Ibid*, para. 180.)

45. The content of this offence under Article 3 of the ICTY Statute is the same as for wilful killing. (*Ibid*, para. 181.)

46. This offence appears in Article 3(1)(a) common to the Geneva Conventions, but is to be linked to Article 2(a) (wilful killing), Article 2(b) (inhuman treatment), and Article 2(c) (causing serious injury to body) of the Statute. (*Ibid*, para. 182) The *mens rea* is that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness. (*Ibid*.)

47. The devastation must be such that it was not justified by military necessity and it must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused. (*Ibid*, para. 183.)

48. This prohibition extends both to isolated acts of plunder for private interest and to the organised seizure of property as part of a systematic exploitation of occupied territory. (*Ibid*, para. 184.)

49. The damage or destruction must have been intentionally committed to clearly identifiable religious or educational institutions that were not being used for military purposes at the time and were not in the immediate vicinity of military objectives. (*Ibid*, para. 185.)

50. The Trial Chamber held that treatment may be cruel regardless of the status of the persons concerned and, moreover, that cruel treatment may be defined as "an intentional act or omission 'which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention.'" (*Ibid*, para. 186.)

51. This offence is prohibited by Article 3(b) common to the 1949 Geneva Conventions which is covered by Article 3 of the ICTY Statute. The definition of a hostage here is similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute (see *supra* n.39.) Moreover, to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. (*Ibid*, para. 187.)

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

(c) Article 5: crimes against humanity

General Blaskic was charged with murder, persecution,[52] and other inhumane acts as crimes against humanity under Article 5 of the ICTY Statute. The Chamber correctly noted that for each of these offences to be characterised as a crime against humanity they must be part of a widespread or systematic attack against a civilian population.[53] The requisite *mens rea* of a perpetrator for his acts to constitute a crime against humanity is that the perpetrator must knowingly participate in a widespread or systematic attack against a civilian population.[54]

The requirements of "widespread" and "systematic" do not both need to be satisfied for an act to be characterised as a crime against humanity. It is sufficient if one of the conditions is fulfilled.[55] The widespread characteristic refers to the scale of the acts perpetrated and to the number of victims: a crime may be widespread if either there is a cumulative effect of a series of inhumane acts or there is a single inhumane act of extraordinary magnitude.[56] The systematic character refers to four elements: first, the existence of a political objective, a plan pursuant to which the attack is perpetrated, or an ideology to destroy, persecute or weaken a community;[57] second, the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; third, the preparation and use of significant public or private resources, whether military or other; and, finally, the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[58]

The term "civilian population" in Article 5 of the Statute should not, according to the Chamber, be interpreted narrowly, and can include persons who were former combatants but who were no longer taking part in hostilities when the crimes were taking place.[59] Moreover, the status of "civilian" is applicable to persons who bear arms, but who are not strictly speaking carrying out military operations: e.g., "a head of family" who was "trying to protect his family gun-in-hand does not thereby lose his status as a civilian."[60]

52. The Chamber found that the crime of "persecution" encompasses not only bodily and mental harm and infringements upon individual freedom, but also acts which appear less serious—e.g. attacks against property—so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community. (*Ibid*, para. 233.)
53. *Ibid*, paras 198, 201–202.
54. On the elements of the knowledge required, see *ibid*, paras 245–259.
55. *Ibid,* para. 207.
56. *Ibid*, para. 206.
57. The plan does not need to have been expressly declared or even stated clearly and in precise terms. It may be surmised from, *inter alia*, the general historical circumstances and the overall political background against which the criminal acts are set; the establishment and implementation of autonomous political and military structures in an area; the general content of a political programme outlined in the writings and speeches of its authors; media propaganda; co-ordinated and repeated military offensives; alterations to the ethnic composition of populations; and the scale of the acts of violence perpetrated. (*Ibid*, para. 204.)
58. *Ibid*, para. 203.
59. *Ibid*, para. 214.
60. *Ibid*, para. 213.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

D. The Individual Criminal Responsibility of the Accused

The Prosecutor alleged that the individual criminal responsibility of General Blaskic for the alleged crimes was based on Article 7(1) and 7(3) of the ICTY Statute.

General Blaskic was not prosecuted for having personally committed any of the alleged crimes, but rather for having, under Article 7(1), planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of the alleged crimes. Concerning the first three forms of participation—planning, instigating, and ordering—in Article 7(1), the Trial Chamber found that the requisite *mens rea* is that the person "directly or indirectly intended that the crime in question be committed."[61] In respect of the definitional elements of these three forms of participation, the Chamber concurred with the relevant findings of the ICTR Trial Chamber in the *Akayesu* case.

The planning referred to in Article 7(1) implies that "one or several persons contemplate designing the commission of the crime at both the preparatory and execution phases".[62] The Chamber held that circumstantial evidence may provide sufficient proof of the existence of such a plan.[63] The term instigating entails prompting another to commit an offence. Although the term is interpreted broadly to include both acts and omissions, there is, however, the requirement that a causal relationship can be established between the instigation and the physical perpetration of the crime.[64] The ordering envisaged in Article 7(1) implies a superior-subordinate relationship between the person giving the order and the person who executes the order. The order does not, however, need to be given by the superior directly to the person or persons who commit the *actus reus* of the offence; and, moreover, what is important is the commander's *mens rea*, not that of the subordinate executing the order.[65] The definitional elements of aiding and abetting are complex, although they have, however, been clarified by earlier ICTY/ICTR cases.[66] The *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime;[67] while the *mens rea* required is that "the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."[68]

General Blaskic was also charged under Article 7(3) of the ICTY Statute which provides that a superior will be held individually criminally responsible for crimes if "he knew or had reason to know that the subordinate was about to commit such

61. *Ibid*, para. 278.
62. *Prosecutor* v. *Jean Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 480, as cited in the *Blaskic* case, *supra* n.3, para. 279.
63. *Blaskic* case, *supra* n.3, para. 279.
64. *Ibid*, para. 280.
65. *Ibid*, para. 282.
66. *Prosecutor* v. *Anto Furundzija*, Case no. IT-95-17/1-T, 10 Dec. 1998; *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, 7 May 1997; *Akayesu* case, *supra* n.62; and *Prosecutor* v. *Zejnil Delalic et al*, Case No. IT-96-21-T, 19 Nov. 1998 (hereafter "*Celebici* case").
67. *Blaskic* case, *supra* n.3, para. 283. The *actus reus* may also be committed through an omission, provided the failure to act had a decisive effect on the perpetration of the crime and that it was of course coupled with the requisite *mens rea*. (*Ibid*, para. 284.)
68. *Ibid*, para. 286.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

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." This customary international law principle of superior or command responsibility[69] encapsulated in Article 7(3) has previously been considered in the ICTY *Celebici*[70] and *Aleksovski*[71] cases and the ICTR *Kayishema* case.[72] Drawing on this earlier jurisprudence, the Trial Chamber in *Blaskic* stated that in order to convict a person under Article 7(3) of the Statute the following three elements need to be proved.

First, that there existed a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime. This relationship is not limited to individuals who are formally designated commander and possess *de jure* command, but it also includes a person who possesses *de facto* command (effective control) over the perpetrators of the crime.[73]

Second, is the *mens rea* element of Article 7(3) which can be established either through actual knowledge[74] or that the commander "had reason to know" that the crime was about to be or had been committed. The "had reason to know" standard was the source of considerable discussion both before the Trial Chamber and in its judgment. The Prosecution contended that the Trial Chamber in the *Celebici* case had rendered an incorrect standard based solely on Article 86 of Additional Protocol I,[75] and that, as a minimum, a commander is required to establish and use an effective reporting system to ensure any violation is brought to his attention.[76] The Chamber in the *Blaskic* case departed from the *Celebici* approach when it found that it was necessary to read Article 86(2) in conjunction with Article 87 of Additional Protocol I,[77] and that this led to the position that a commander's "role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose."[78] The Trial Chamber also considered, *inter alia*, the findings of the Israeli Commission of Inquiry concerning events in refugee camps in Beirut in 1982 as providing further evidence of the content of customary international law. The Chamber quoted with approval the negligence standard

69. On the customary status of this principle, see *Blaskic* case, *supra* n.3, para. 290.

70. *Celebici* case, *supra* n.66. For discussion of these cases, see Bantekas, I., "The Contemporary Law of Superior Responsibility", *A.J.I.L.*, 93 (1999), p.573.

71. *Prosecutor* v. *Zlatko Aleksovski*, Case No. IT-95–14/1-T, 25 June 1999.

72. *Prosecutor* v. *Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95–1-T, 21 May 1999.

73. *Blaskic* case, *supra* n.3, paras 300–301.

74. The actual knowledge element can be proved through either direct or circumstantial evidence. The latter including, *inter alia*, the following types of evidence: "the number, type and scope of the 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 speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time." (*Ibid*, para. 307.)

75. The *Celebici* Trial Chamber stated: "a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates." (*Celebici* case, *supra* n.66, para. 393.)

76. *Blaskic* case, *supra* n.3, para. 312.

77. *Ibid*, para. 329.

78. *Ibid*, para. 329 (footnote omitted).

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

used by the Commission for imputing responsibility,[79] and went on to conclude its consideration of the "had reason to know standard" by finding that "if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute."[80] The difficulty with this final position of the Trial Chamber is that it lacks clarity on the crucial issue of whether a commander is required to establish an effective reporting system to ensure that a potential or actual violation is brought to his attention. Yet it was the raising of this very issue initially by the Prosecutor that led the Chamber to state its own interpretation of the "had reason to know standard". It may be argued that the reference to "due diligence" of a commander incorporates the Chamber's earlier reference to the effect of Article 87 of Protocol I on the customary law position such that an effective reporting system may be required and that the failure to establish or use such a system constitutes "negligence in the discharge of his duties", but the position has not been made as clear as it should have been. This may well be an important point that the Prosecutor should raise before the Appellate Body. It will not change the outcome of this case, but it is an important point of principle that requires clarification for future ICTY/ICTR cases.

The third and final element that must be proved for a commander to be held criminally responsible under Article 7(3) is that he failed to take the necessary and reasonable measures to prevent the crime or after the commission of the crime to punish the perpetrator. The Chamber held that it is a commander's degree of effective control, his material ability, that will determine whether the measures he took in a particular case either to prevent the crime or punish the perpetrator were "reasonable".[81] The Chamber emphasised that the obligation to "prevent" or "punish" does not provide a superior with two alternative paths to pursue: where a superior knew or had reason to know subordinates were about to commit crimes and failed to prevent their commission, he cannot in the alternative simply punish the subordinates and hope thereby to escape criminal responsibility.[82]

E. The Events in the Lasva Valley and the Responsibility of Blaskic

The main HVO attacks that saw HVO troops commit the bulk of the crimes with which General Blaskic was charged took place in April 1993 and the following months.[83] The Chamber found that attacks were carried out against 25 towns, villages, and hamlets inhabited by Bosnian Muslims in the municipalities of Vitez, Busovaca, and Kiseljak in the Lasva Valley region of Central Bosnia. Nine of these attacks in the Vitez municipality occurred on 16 April 1993 when Croatian

79. *Ibid*, para. 331.
80. *Ibid*, para. 332.
81. *Ibid*, para. 335.
82. *Ibid*, para. 336.
83. There was also a previous HVO attack on 20 Jan. 1993: see, *ibid*, paras 371–383.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

forces at 05:30 hours simultaneously attacked Ahmici, Santici, Pirici, Nadioci, Novaci, Putis, Vitez, Stari Vitez, and Donja Veceriska. There were also attacks on the villages of Gacice (20 April) and Grbavica (7–8 September) in the Vitez municipality. In the municipality of Busovaca there were attacks by HVO forces on Loncari (16–17 April) and Ocehnici (19 April). While in the Kiseljak municipality all of the attacks took place on 18 April (Behrici, Gomionica, Gromiljak, Hercezi, Polje Visnijica, Visnijica, Rotilj, and Svinjarevo), with the exception of the attacks on Grahovci, Han Ploca, and Tulica, that took place on 12 June 1993.

The Trial Chamber found General Blaskic guilty of all of the alleged crimes with the exception of the shelling of Zenica town centre on 19 April 1993 which could not be imputed to the HVO beyond all reasonable doubt and as such General Blaskic was found not guilty of counts 3 and 4 (violation of the laws or customs of war) in relation to the shelling of Zenica.[84]

Due to considerations of brevity it is not proposed to carry out a detailed review of each of the attacks and the crimes committed against persons detained after these attacks[85] together with the individual criminal responsibility of General Blaskic for each of these crimes. In order to illustrate the types of issues involved in the case it will be sufficient to review the attacks on the villages of Ahmici, Santici, Pirici, and Nadioci in the Vitez municipality.[86]

84. *Ibid*, paras 677–678.

85. The crimes covered by counts 15–20 in the indictment concern crimes committed against Bosnian Muslim civilians or persons who were *hors de combat* while being detained by the HVO.

The Trial Chamber found that detainees were subjected to inhuman treatment (count 15) and cruel treatment (count 16), since they were used as human shields; forced to dig trenches often on the battle front-lines (during which several were killed or wounded); raped; beaten; and subjected to, *inter alia*, mental violence, threats, and deprivation of sufficient food and water during detention in the municipalities of Vitez (*ibid*, 694–700), Kiseljak (*ibid*, paras 690–693), and Busovaca (*ibid*, paras 688–689). The Chamber found Blaskic criminally responsible for these crimes on the basis of Article 7(3) of the ICTY Statute, since the accused exercised effective control over the perpetrators of the crimes (*ibid*, paras 722–725), and that since he had ordered the detention of the Muslim civilians he must have known of the acts of violence taking place and the conditions of detention (*ibid*, para. 733). In any case Blaskic was criminally responsible since he did not take reasonable measures to punish the perpetrators of the crimes either by investigating the crimes, imposing disciplinary measures, or by sending a report on the perpetrators of these crimes to the competent authorities. (*Ibid*, para. 734.)

The Chamber found that protected persons were taken hostage by the HVO and used both in prisoner exchanges and in order to bring to a halt military operations by Bosnian Muslim armed forces (ABiH) against the HVO such that the offences in counts 17 and 18 of the indictment were constituted (*ibid*, paras 705–708); and, moreover, that the accused was criminally responsible for this crime (*ibid*, paras 739–741).

On the final two counts (19 and 20) concerning the finding by the Chamber of inhuman and cruel treatment of detainees by using them as human shields, see *ibid*, paras 713–716; and for the individual criminal responsibility of Blaskic for these crimes, see *ibid*, paras 742–743.

86. On the attacks by the HVO against Muslim civilians in the municipality of Busovaca in April 1993, the crimes committed in this area, and the individual criminal responsibility of General Blaskic, see *ibid*, paras 563–592; and in the municipality of Kiseljak, see *ibid*, paras 593–661.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

The attacks on Ahmici, Santici, Pirici, and Nadioci

The Trial Chamber found that the simultaneous attack on 16 April 1993 at 05:30 hours against Ahmici, Santici, Pirici, and Nadioci was a planned attack against the civilian population;[87] that it was organised at a high level of the military hierarchy;[88] and that the attack was carried out by regular HVO units (in particular the Viteska brigade who were based in Vitez) and HVO Military Police units (including the special forces unit, the Dzokeri) who acted in a "perfectly co-ordinated manner".[89] The Chamber also found that the attacks were directed specifically against the Muslim civilian population, since there was the absence of any military objective for the attacks;[90] the objective and targeting was discriminatory in nature;[91] and only Muslims were arrested.[92] Concerning the constituent crimes that made up the generic crime of persecution, a number of eye witnesses described the murder of their male relatives mostly at point blank range,[93] while the British UNPROFOR battalion in the area reported that "[o]f the 89 bodies which have been recovered from the village [of Ahmici], most are those of elderly people, women, children and infants"[94]; the Muslim houses had been systematically burned;[95] institutions dedicated to religion had been destroyed;[96] and the HVO soldiers had stolen money from Muslim civilians and had looted the Bosnian Muslim houses that were still intact.[97]

The Trial Chamber then focused on the issue of General Blaskic's alleged criminal responsibility for these crimes. The Chamber found that the accused had

87. *Ibid*, para. 385.

88. This finding was based on four factors. First, that the attacks were preceded by several political declarations by Bosnian Croat politicians announcing that a conflict between Croatian and Muslim forces was imminent. (*Blaskic* case, *supra* n.3, paras 387–388.) Second, that the Croatian inhabitants of the villages were warned of the attack and that Croatian women and children had in Ahmici been evacuated on 15 April and in other areas Bosnian Croat families had left several days before the attacks. (*Ibid*, para. 389.) Third, the method of attack displayed a high level of preparation. (*Ibid*, para. 390.) Members of the U.K. contingent of the UN peace-keeping force in the area (UNPROFOR), testified that the main roads were blocked by HVO troops, and, moreover, that the attack occurred from three sides and was designed to force the fleeing population towards elite marksmen with sophisticated weapons who shot those escaping. (*Ibid*, para. 390.) The Trial Chamber also noted that "[o]ther troops, organised in small groups of about five to ten soldiers, went from house to house setting fire and killing." (*Ibid*, para. 390.) Fourth, that international observers, mostly military experts, who went to the site after the attack had all stated that such an operation could only be planned at a high level of the military hierarchy. (*Ibid*, para. 391.) This was accepted by General Blaskic who stated under cross-examination before the Trial Chamber that the attack was "an organised, systematic and planned crime." (*Ibid*, para. 392.)

89. *Blaskic* case, *supra* n.3, para. 400.

90. *Ibid*, paras 402–410.

91. *Ibid*, paras 411–412.

92. *Ibid*, para. 413.

93. *Ibid*, para. 414.

94. *Ibid*, paras 416. The European Commission Monitoring Mission (ECMM) report on the attack on Ahmici states that at least 103 people were killed during the attack. (*Ibid*, para. 417.)

95. *Ibid*, para. 418.

96. *Ibid*, paras 419–423.

97. *Ibid*, para. 424.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

ordered the attack of 16 April 1993. General Blaskic had submitted to the Chamber three orders given to his troops on 15–16 April 1993. It was the third of these orders given on 16 April at 01:30 hours addressed to the Viteska brigade and to other independent HVO units which the Chamber held was very clearly an order to attack given by General Blaskic.[98] The order requires the forces to be ready to open fire at 05:30 hours and, by way of combat formation, provided for blockade, search and attack forces. General Blaskic closed the order by saying that the "instruction given previously [should be] complied with",[99] although the Chamber was not able definitively to establish what was the content of that instruction. The Defence argued that it was the troops belonging to the Dzokeri unit who took part in the attack and that they acted beyond the accused's orders when they committed the crimes alleged against the accused. The Chamber dismissed this contention, pointing out that the evidence established that regular HVO units also participated in the commission of the crimes,[100] and that in any case General Blaskic had effective command authority over all the units involved.[101] The Trial Chamber also dismissed the argument that these crimes were committed by uncontrolled elements by emphasising their scale, uniformity, and co-ordination (widespread and systematic in nature);[102] and that the testimony of the survivors "of the massacres tended to show that the civilians were killed in response to orders."[103]

The Trial Chamber held that even if there was still doubt about whether the accused ordered the attack with the clear intention that the massacres were to be committed, he would still be liable under Article 7(1) for having ordered the crimes since "any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) so as to incur responsibility for having ordered, planned or incited the commitment of the crimes."[104] *In casu*, the Trial Chamber found that the accused had known that the troops which he planned to use for the 16 April attack had previously been guilty of many crimes against the Muslim population of Bosnia,[105] and yet did not ensure that measures had been taken so that the criminal elements of these forces were not in a position to do any harm.[106] The Trial Chamber went further when it found that General Blaskic was criminally responsible also under Article 7(3) since he "knew that crimes had been or were about to be committed" and took no preventive action,[107] and since he did not punish the HVO soldiers who perpetrated the crimes.[108]

98. *Ibid*, paras 435, 437.
99. *Ibid*, para. 435.
100. *Ibid*, para. 440.
101. *Ibid*, paras 442–466.
102. *Ibid*, paras 467–468.
103. *Ibid*, para. 472.
104. *Ibid*, para. 474.
105. *Ibid*, para. 474.
106. *Ibid*, para. 474.
107. *Ibid*, paras 477–485, 495.
108. *Ibid*, para. 495.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press

F. Concluding Remarks

The *Blaskic* case continues the important work of the ICTY in clarifying concepts of international humanitarian law and applying them to a modern day conflict. A major contribution of this case has concerned the concept of command responsibility. The Trial Chamber not only clarified the obligations of military commanders, but went on to state in its review of the principles of sentencing the following:

> When a commander fails in his duty to prevent the crime or to punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes. It would not in fact be consistent to punish a simple perpetrator with a sentence equal or greater to that of the commander. … Command position must therefore systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances … .[109]

This statement together with the 45 year prison sentence given to General Blaskic serve as a modern day warning to commanders that failure to comply with their obligations under international humanitarian law—as set out in the case—carries the most serious criminal responsibility. The clarification of these obligations and this clear warning signal may well be the most important legacy of the *Blaskic* case.

DANESH SAROOSHI*

109. *Ibid*, para. 789.

* Senior Lecturer in Public International Law, University College London. The author worked previously with the Office of the Prosecutor, UN International Criminal Tribunal for the former Yugoslavia. However, the views expressed are personal and should not be taken to represent those of the Office of the Prosecutor or of the United Nations.

https://doi.org/10.1093/iclq/50.2.447 Published online by Cambridge University Press