A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor *v.* Tihomir Blaškić

W.J. Fenrick[*]

Keywords: unlawful attack, command responsibility, crime against humanity, persecution.

Abstract: The ICTY Trial Judgment in the Prosecutor *v.* Tihomir Blaškić is the first judicial decision to explicitly address unlawful attack charges. This article reviews the judgment focusing on how the trial chamber addressed individual criminal responsibility, unlawful attack charges, the crime against humanity of persecution, and the relationship between the two offences. The author observes that the decision contains little legal analysis but a review of the factual findings sheds light on legal assumptions. In particular, the findings indicate a willingness to accept that indiscriminate or disproportionate attacks might provide evidence of attacks essentially directed against civilians, a tendency to regard *ad hoc* ill equipped resistance to an attack as equivalent to no resistance, and a tendency to evaluate the lawfulness of an attack on the basis of what happened after the attack as well as during the attack.

1. INTRODUCTION

On 3 March 2000, a trial chamber of the ICTY issued its judgment in The Prosecutor *v.* Tihomir Blaškić[1] finding General Blaškić guilty of the crime against humanity of persecution, and of various other crimes against humanity and war crimes, including unlawful attacks on civilians and civilian objects. General Blaškić was sentenced to forty-five years in prison, the heaviest sentence awarded by an ICTY trial chamber to date. As a general statement, the treaties which constitute the bulk of international humanitarian law are worded at a high level of generality, particularly insofar as they address the conduct of hostilities. Further, there are no usable precedents for judicial determination of the lawfulness of particular attacks. The war crimes trials held following the Second World War were concerned with crimes committed against victims who were in occupied territory or in some other way in the hands of the perpetrators. Although the Kupreskić Judgment implicitly addressed the unlawful attack is-

* Senior Legal Advisor, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. These comments are made in a personal capacity and do not necessarily reflect the views of either the Office of the Prosecutor or the United Nations.

1. Prosecutor *v.* Tihomir Blaškić,Case No. IT-95-14-T, 3 March 2000.

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sue,[2] the Blaškić Judgment is the first to explicitly address that issue. This comment will review how the Blaškić trial chamber addressed individual criminal responsibility, unlawful attack charges, the crime against humanity of persecution, and the relationship between the two offences.

The incidents addressed in the indictment occurred during the period from May 1992 to January 1994. During that period Tihomir Blaškić, who had previously been a Captain First Class in the Yugoslav People's Army (JNA), was a Colonel in the Bosnian Croat Army (HVO). He was an HVO officer from the establishment of the HVO on 8 April 1992 and from 27 June 1992 to August 1994 he was the commander of the HVO Armed Forces Region of Central Bosnia (CBOZ). In August 1994 he was promoted to the rank of General and appointed Commander of the HVO, with his headquarters in Mostar. In November 1995 he was appointed Inspector General in the General Inspectorate of the army of the Republic of Croatia (HV). During the period when then Colonel Blaškić was the commander of the CBOZ, HVO forces in the region attacked cities, towns and villages inhabited by Bosnian Muslims, killed and caused serious injury to Bosnian Muslim civilians, destroyed or plundered Bosnian Muslim property, treated Bosnian Muslim civilians in an inhumane fashion, and forcibly transferred Bosnian Muslim civilians. The best known incident in this sequence of events was the attack on the village of Ahmici on 16 April 1993. Several other attacks occurred on the same date. These activities were the subject of charges in this case and in others.[3]

2. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR MILITARY COMMANDERS

As General Blaškić was a military commander during the period covered by the indictment, he could, potentially, be held criminally responsible under one or both of Article 7(1) and Article 7(3) of the ICTY Statute. Article 7(1) states in part: "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible [...]." General Blaškić did not personally commit a crime. The Trial Chamber held that a person planning, instigating or ordering the commission of an offence must possess:

> [...] the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed. However, in general, a person other than the person who planned, instigated or ordered is the one who perpetrated the *actus reus* of the offence. In so doing he must have acted in furtherance of a plan or order. In the case of insti-

2. Prosecutor *v.* Zoran Kupreskić *et al.*, Case No. IT-95-16-T, 14 January 2000.
3. *Kupreskić* case, *supra* note 2; Prosecutor *v.* Kordić and Čerkez, Case No. IT-95-14/2, ongoing.

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> gating, ... proof is required of a causal connection between the instigation and the fulfilment of the *actus reus* of the crime.[4]

The Trial Chamber went on to indicate that circumstantial evidence could provide sufficient proof of the existence of a plan (para. 279), that instigation could be constituted by acts or omissions, express or implied (para. 280) and that orders may also be explicit or implicit (para. 281).

Concerning aiding and abetting, the Trial Chamber (para. 283) concurred with the Furundžija Trial Chamber[5] which stated:

> the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence.

The Trial Chamber went on to hold that the *actus reus* of aiding and abetting could be perpetrated through omission and that presence at the crime scene of a military commander is relevant to determining whether the commander encouraged or supported the perpetrators. Concerning *mens rea*, the Trial Chamber elaborated upon the Furundžija judgment and held that "in addition to knowledge that his acts assist the commission of the crime, 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" (para. 286).

A military commander may also be held liable according to international law under the doctrine of command responsibility which is incorporated into the ICTY Statute through Article 7(3) which states:

> [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.

The doctrine of command responsibility is rooted in customary law, particularly in the post-World War II war crimes case law.[6] It appears to be an application of the doctrine of accomplice liability to the special situation of military commanders and others in a position of superior authority and not an independent doctrine of criminal liability. The first attempt to comprehensively encapsulate the doctrine in a treaty is Article 28 of the Rome Statute of the International Criminal

4. *Blaškić* Case, *supra* note 1, para. 278.
5. Prosecutor *v.* Furundžija, Judgment, Case No. IT-95-17/1-T, Tr. Ch. II, 10 December 1998.
6. W.H. Parks, *Command Responsibility for War Crimes*, 62 Military Law Review 1 (1973).

Court (ICC), which is not yet in force.[7] Previous references to the doctrine in treaty form, including Article 7(3) of the ICTY Statute and Articles 86 and 87 of Additional Protocol I,[8] have not been comprehensive and have always required some relation back to customary law.

As to the essential elements of command responsibility, the Trial Chamber concurred with the Čelebići and Aleksovski Trial Chambers and held in paragraph 294:

> [...] Accordingly, for a conviction under Article 7(3) of the Statute in the present case, proof is required that:
>
> (a) there existed a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime;
> (b) the accused knew or had reason to know that the crime was about to be or had been committed; and
> (c) the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.

Concerning the superior-subordinate relationship, the Trial Chamber endorsed the Čelebići approach and held in paragraph 300:

> [...] in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.

Concerning the meaning of "knew or had reason to know" the Trial Chamber adopted a different approach from that adopted by the Čelebići Trial Chamber. Both chambers agreed that actual knowledge could be proved by direct or circumstantial evidence and that in determining whether a superior must have had knowledge it could consider several criteria including:

> 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.[9]

The Čelebići Trial Chamber determined that the customary law meaning of "had reason to know" was:

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7. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9* as corrected by procès-verbaux of 10 November 1998 and 12 July 1999.
8. 1977 Geneva Protocol I Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3 (1979).
9. *Blaškić* Case, *supra* note 1, para. 307.

> 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. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[10]

In coming to this conclusion, the Čelebići Trial Chamber reviewed the post World War II war crimes cases, the text of Articles 86 and 87 of Additional Protocol I, the negotiating history of Article 86, and Article 28 of the ICC Statute. In brief, it conceded that the post World War II war crimes cases and the ICC Statute suggested that a broader knowledge standard applied after World War II and at the present time but it held that a customary law belt tightening exercise was in effect during the period when the offences referred to in the Čelebici indictment were committed. The basis for this conclusion was the negotiating record for Article 86.

The Blaškić Trial Chamber reviewed the same material and concluded that the post World War II customary law position was not temporarily altered by the adoption of Additional Protocol I. In brief, it held that Article 86 of Additional Protocol I had to be read together with Article 87 which imposed obligations on military commanders to take practicable measures to instruct their forces in the law, to ensure legal issues were taken into account in the decision making process, to establish a reporting mechanism for violations and to monitor the reporting mechanism to ensure it functioned effectively. The Chamber went on to state in paragraph 332:

> In conclusion, the Trial Chamber finds 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.

The approach taken by the Blaškić Trial Chamber on "had reason to know" is in line with the approach argued by the Office of the Prosecutor (OTP) in the as yet undecided Člebici appeal. The OTP argument was that the Čelebici Trial Chamber approach, in ignoring the duties imposed on commanders, would encourage them to raise a defence that they should not be held criminally responsible because, having failed to carry out their legal duties, they did not know their subordinates were committing offences.

10. Quoted in *Blaškić* case, *id.*, para. 310.

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Concerning the meaning of necessary and reasonable measures to prevent or punish, the Trial Chamber agreed with the Čelebici Trial Chamber and held in paragraph 335:

> [...] it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator [...] this implied that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.

In the course of its evaluation of the facts to determining criminal responsibility, the Trial Chamber concluded that the massive and systematic nature of certain crimes proved that they were committed on orders. "The planned nature and, in particular, the fact that all these units acted in a perfectly coordinated manner presupposes in fact that those troops were responding to a single command, which accordingly could only be superior to the commanders of each of those units." (para. 467).

Relying on the approach taken in the Israeli Kahan Report into events in the Beirut Refugee Camps in 1983[11] the court held in paragraph 474:

> [...] 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. In this case, the accused knew that the troops which he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population of Bosnia.

The Trial Chamber's approach to the meaning of "had reason to know", its willingness to draw an inference that offences had been ordered because of their widespread and systematic nature, and its willingness to assign criminal responsibility to superiors for the subsequent activities of their troops who are known to have been guilty of offences in the past may well have an impact on future judgments.

3. UNLAWFUL ATTACK CHARGES

General Blaškić was charged with counts related to persecution (count 1), unlawful attacks on civilians and civilian objects (counts 2-4), wilful killing and causing serious injury (counts 5-10), destruction and plunder of property (counts 11-13), destruction of institutions dedicated to religion or education (count 14), inhumane treatment, the taking of hostages, and the use of human shields

11. Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut, 7 February 1983, *reproduced in* 22 ILM 473-520 (1983).

(counts 15-20).[12] The incidents which formed the basis for counts 2-14 and much of count 1 occurred during or in the immediate aftermath of attacks on towns and villages, that is, in the course of combat. An obvious distinction between incidents which occur during combat and incidents which occur outside of a combat context is that a much wider range of forceful activity is permissible in combat. Military commanders are allowed to attack military objectives, including enemy combatants. Enemy combatants who have not surrendered or otherwise become hors de combat may be injured or killed. Material military objectives may be damaged or destroyed. Further, although military operations must be directed against military objectives to avoid, or in any event, to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects, such losses may occur on occasion without a consequential violation of international humanitarian law. The death or injury of civilians and damage or destruction of civilian objects may occur during combat and such regrettable events do not always indicate the commission of an offence.

General Blaškić was charged with responsibility for unlawful attacks on civilians and civilian objects in nine named towns or villages (Ahmici, Nadioci, Pirici, Santici, Ocehnici, Vitez, Stari Vitez, Rotilj, and Zenica) as follows:

> Count 3: an unenumerated VIOLATION OF THE LAWS OR CUSTOMS OF WAR, as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal and customary law, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II (unlawful attack on civilians).
>
> Count 4: an unenumerated VIOLATION OF THE LAWS OR CUSTOMS OF WAR, as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal and customary law and Article 52(1) of Protocol I (unlawful attack on civilian objects).

It should also be noted that the enumeration of incidents related to Count 1 (persecution contrary to Article 5(h) of the ICTY Statute) includes: "6.1. The widespread and systematic attack of cities, towns and villages, inhabited by Bosnian Muslims, in the municipalities of Vitez, Busovaca, Kiseljak, and Zenica."

The villages referred to above with reference to Counts 3 and 4, together with many others, were located in the municipalities referred to in Count 1. Counts 3 and 4 were worded as they were because it was not clear at the commencement of the case whether or not the prosecution would be able to establish that the law for international conflict was applicable and because the prosecution wished to further the development of a common core of law applicable to all conflicts, a concept envisaged by the Appeals Chamber in its decision in the Tadić Jurisdiction Appeal.[13]

12. Blaškić Second Amended Indictment, Case No. IT-95-14, 25 April 1997.
13. The Prosecutor *v.* Dusko Tadić. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR 72, 2 October 1995, paras. 110-112.

At the beginning of the Blaškić case, the prosecution envisaged the court having three options available: a) to decide that the conflict between the Bosnian Croats and the Bosnian Muslims was international, in which case Additional Protocol I would apply in entirety, b) to decide that the conflict was not international but that portions of Additional Protocol I, in particular Article 48 to 58, applied to the conflict because of an agreement between the parties pursuant to Common Article 3 of the Geneva Conventions,[14] c) to decide the conflict was internal and Additional Protocol II applied.

Additional Protocol I,[15] which applies to international conflicts, has several detailed provisions designed to protect civilians and civilian objects (Articles 48-79) and it also contains grave breach provisions related to unlawful attacks committed wilfully which cause death or serious injury (Article 85). Additional Protocol II,[16] which applies to internal conflicts, is much more skeletal. Article 13(2) states in part: "The civilian population as such, as well as individual civilians, shall not be the object of attack". Protocol II has no grave breach provisions, no definition of military objectives and no general protection of civilian objects provision. It must be noted, however, that when the Appeals Chamber, in the Tadić Jurisdiction Decision, addressed the concept of a common core of law applicable to all conflicts, it specifically referred to UN General Assembly Resolution 2675 of 9 December 1970 as a document containing principles applicable to al conflicts. One of these principles provides in part: "5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations."[17] This principle provides a basis for an assertion that attacks may not be directed against civilian objects in any armed conflict.

The Trial Chamber held that the law for international armed conflict applied to the incidents addressed in the Blaškić indictments because of the control exercised by Croatia over the HVO and over the Bosnian Croat entity (para. 123). It held further that, in any event, Articles 48-58 of Additional Protocol I applied to the conflict as a result of an agreement entered into by the parties to the conflict pursuant to Common Article 3 of the Geneva Conventions (paras. 172-73).

The Trial Chamber agreed with the elements for unlawful attack charges put forward by the Prosecution (para. 180). These elements were:

> Count 3: Unlawful Attack on Civilians
>
> The essential elements of Count 3 are as follows:

14. Bosnia and Herzegovina, Agreement No. 1 of 22 May 1992 *in* M. Sassoli & A.A. Bouvier, How Does Law Protect in War 1112 (1999).
15. 1977 Geneva Protocol I Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3 (1979).
16. 1977 Geneva Protocol II Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609 (1979).
17. UN Doc. A/RES/2675 (1970), *in* D. Schindler & J. Toman (Eds.), The Laws of Armed Conflict 267-268 (1998).

a.) an attack resulted in civilian deaths, serious injury to civilians, or a combination thereof;
b.) the civilian status of the population or individual persons killed or seriously injured was known or should have been known;
c.) the attack was wilfully directed at the civilian population or individual civilians;
d.) there is a nexus between the attack and an armed conflict, whether international or internal in character; and
e.) the accused bears individual criminal responsibility for the attack under Article 7(1) or 7(3) of the Statute.

Count 4: Unlawful Attack on Civilian Objects

The essential elements of Count 4 are as follows:

a) an attack resulted in damage to civilian objects.
b) the civilian character of the objects damaged was known or should have been known;
c) the attack was wilfully directed at civilian objects;
d) there is a nexus between the attack and an armed conflict, whether international or internal in character; and
e) the accused bears individual criminal responsibility for the attack under Article 7(1) or 7(3) of the Statute.[18]

For the unlawful attack on civilians charge, the elements were derived entirely from Article.51(2) of Protocol I and Article 13(2) of Protocol II. For the unlawful attack on civilian objects charge, the elements were derived from Article 52(1) of Protocol II and customary law. The elements put forward by the prosecution might be compared with recently adopted elements for analogous offences under the ICC Statute:

Article 8(2)(b)(i) War crime of attacking civilians

Elements

- The perpetrator directed an attack.
- The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
- The perpetrator intended the civilian population as such or individual civilians not taking part in hostilities to be the object of the attack.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

18. Summary of Prosecutor's Closing Brief, Annex 1, at 1-2.

Article 8(2)(b)(ii) War crime of attacking civilian objects

Elements

- The perpetrator directed an attack.
- The object of the attack was civilian objects, that is, objects which are not military objectives.
- The perpetrator intended such civilian objects to be the object of the attack.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[19]

Two indentifiable differences are that the prosecution version required that the attacks actually resulted in death or injury to civilians or damage to civilian objects as appropriate while the ICC elements do not and the prosecution requires that the conduct be wilful while the ICC elements require the conduct to be intentional. The rationale for the different approaches is that the particular offences prosecuted by the ICTY are derived from the Additional Protocols, particularly Additional Protocol I, while the ICC offences are not. The prosecution derived the mental element "wilful" from Article 85, the grave breach provision of Additional Protocol I. In the ICRC commentary on Article 85, "wilful" is defined as including both intention and recklessness.[20] An underlying reason is that Additional Protocol I imposes a wide range of duties on superiors to ensure their forces comply with the law and to ensure precautions are taken to avoid attacks are directed against civilians or civilian objects. It was the view of the prosecution that these provisions were included by implication in Protocol II. It is inappropriate that a decision maker be allowed to escape liability by pleading that he failed to carry out his duty to take precautions to avoid attacking civilians or civilian objects. The Prosecution included the actual infliction of death or injury on civilians or property damage to civilian objects, as appropriate, because these elements were required in the Protocol I grave breach provisions and it was considered appropriate to include them in the generic unlawful attack offences applicable to all conflicts. In any event, proof of death, injury or damage would usually be necessary to establish the attack was directed at civilian persons or objects.

It should also be noted that the prosecution argued that the occurrence of an attack wilfully directed against civilians could be established in a variety of ways: a) proof that only civilians were killed. As, in modern societies, there is a tendency for military objectives and combatants to be intermingled with civilians and civilian objects, this is perhaps the least likely way in which one could

19. UN Doc. PCNICC/2000/INF/Add.2. 6 July 2000, at 23.
20. Y. Sandoz, C. Surinarski, & B. Zimmerman (Eds.), Commentary on the Additional Protocols, para. 3473, at 994 (1987).

establish an attack was wilfully directed at civilians; b) proof that combatants and civilians were killed without distinction; or c) proof that the number of civilians killed was excessive. The prosecution adopted this approach, notwithstanding the fact Art.51(4) and (5) of Protocol I explicitly refer to indiscriminate and disproportionate attacks, for two reasons: a) Protocol II does not explicitly refer to disproportionate or indiscriminate attacks and there was a desire to have a common offence for all conflicts, and (b) it was the view of the prosecution that indiscriminate attacks, including attacks resulting in excessive civilian casualties, were, in substance, attacks directed at the civilian population.

To determine how the Trial Chamber actually applied the law relating to unlawful attacks to the judgment, one must deconstruct the judgment as it contains very little relevant legal analysis and as its findings are worded in very general terms. If one reads the findings alone, one might be inclined to the view that the Trial Chamber regarded every attack alleged to be unlawful as an unlawful attack with the exception of the shelling of Zenica. If, however, one reads the discussion of individual incidents, a different picture emerges.

Of the nine towns or villages enumerated in the unlawful attack charges, the Trial Chamber held General Blaškić criminally responsibility for attacks against eight. He was acquitted of responsibility for the shelling of Zenica because the chamber did not accept that it had been proven beyond a reasonable doubt that the shelling had been carried out by Bosnian Croat forces. Apparently Bosnian Serb forces had also shelled Zenica on occasion.

The chamber analyzed the attacks on the village of Ahmici, and the neighbouring villages of Santici, Pirici and Nadioci together. It concluded that these attacks, all of which occurred on 16 April 1993, were planned, organized attacks with substantial assets directed against the Muslim civilian population. The attacks were preceded by political declarations indicating a conflict between Croatian and Muslim forces was imminent. Croatian inhabitants of the villages were warned of the attack. The method of attack indicated its purpose"... the attack occurred from three sides and was designed to force the fleeing population towards the south where elite marksmen, with particularly sophisticated weapons, shot those escaping. Other troops, organized in small groups of about five to ten soldiers, went from house to house setting fire and killing (para. 390)." The chamber was "convinced beyond any reasonable doubt that no military objective justified these attacks (para. 410)." The reasons supporting this conclusion were the absence of organized resistance, the indiscriminate killing of men, women and children which occurred during the attack, and the failure of the HVO to establish, at the least, an observation post after seizing control of the area. Concerning a defence argument that the village was defended by armed troops and their presence converted the villages into military objectives, the Chamber held in paragraph 407 that, for all practical purposes, there was no effective defence in Ahmici:

> [...] the territorial defence was starting to organise in the area and consisted of about 120 men whose main task was to carry out night watches. [...] their participation was purely voluntary and there was no disciplinary sanction for those who failed to take their turn on guard. It was therefore a sort of civil defence rather than an army strictly speaking. The members of the territorial defence were very badly equipped and most of them were dressed as civilians and did not think of themselves as soldiers. There was no barracks in Ahmici.

The Trial Chamber went on to assess whether or not the attacks were discriminatory in nature. In so doing it reviewed conduct during and after the attack: the large number of unlawful killings (102 or more in Ahmici itself), destruction of dwellings and of mosques, looting and killing of livestock. The Chamber concluded in paragraph 425: "the methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population."

The Trial Chamber then addressed the attacks on Vitez and Stari Vitez, focusing specifically on attacks on Vitez and Stari Vitez on 16 April 1993, the explosion of a booby trapped oil tanker truck near the Stari Vitez mosque on 18 April 1993, and an attack on Stari Vitez with home made mortars (so called "baby-bombs") on 18 July 1993 (para. 501). The booby-trapped tanker truck contained 500 kilograms of explosives and the conflagration caused by its explosion caused major damage to civilian objects and the death of many civilians (para. 511). The "baby-bombs" were blind weapons and their use was held to be an indiscriminate attack resulting primarily in civilian casualties and damage to civilian objects (para. 512). Concerning the 16 April 1993 attacks, the Trial Chamber conceded Bosnian Muslim troops were present in the towns but regarded the attacks as aimed at civilians and civilian objects because there were no Bosian military casualties reported, the vast majority of victims were civilians (including 96 Muslims and 5 Croats), Muslim areas of the towns were shelled and then came under infantry fire, and Muslim civilian buildings were looted and torched. The Chamber held in paragraph 510:

> Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez. In the event that there had been, the devastation visited upon the town was out of all proportion with military necessity. On the contrary, the attack was designed to implement an expulsion plan, if necessary by killing Muslim civilians and destroying their possessions. As the witness Bower explained,
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> > [i]t appeared to be more of a containment campaign, not to try and seize and hold the ground of Stari Vitez, but more to ensure that the occupants of Stari Vitez didn't expand their enclave or attempt to break out of their enclave. It was more static, more containment.
>
> The Croatian or mixed areas in the town were thus not damaged during the attack.

The Chamber addressed the attack on Ocehnici very briefly:

> 571. Three months later, in the afternoon of 19 April (1993), soldiers from the Military Police, and more precisely the Fourth Battalion, acting on the orders of Pasko Ljubicic, entered the village, fired shots and systematically set fire to the houses and farms belonging to Muslims. They killed around five civilians, women included, and burned the bodies.
>
> 572. The Muslim homes in the village of Ocehnici were torched. Several people were wounded and at least five civilians were killed. Livestock were also slaughtered.

Rotilj, the last of the villages enumerated in the unlawful attack counts, was attacked on 18 April 1993 after its leaders had agreed to turn over weapons and in spite of the fact that the villagers had very few weapons. The attack began with artillery fire. HVO soldiers then searched the houses for weapons, killed several civilians, rounded up most of the rest, pillaged and set fire to the dwellings (paras. 609-612).

The Trial Chamber accepted the arguments of the prosecution that an indiscriminate attack could substantiate an allegation that an attack was in reality directed at civilians in its discussion of the use of "baby-bombs" at Stari Vitez (paras. 501 and 512). In its discussion of the attacks at or near Ahmici, it appeared to pay relatively little heed to the activities of poorly armed or trained part time "soldiers" defending their own villages when assessing whether or not the villages contained military objectives. In determining whether an attack was directed at civilians, the Trial Chamber paid heed to what occurred after a village was overrun, as well as to what occurred during the attack itself. Further, it did not decide that the attack was over once resistance ceased.

4. CRIMES AGAINST HUMANITY

As indicated earlier, the descriptive paragraphs for persecution as a crime against humanity, referred to widespread and systematic attacks of cities, towns and villages, inhabited by Bosnian Muslims, in the municipalities of Vitez, Busovaca, Kiseljak and Zenica. The Trial Chamber held that, for all eight of the villages where unlawful attack charges were proved, it had also been proved beyond a reasonable doubt that the crime against humanity of persecution contrary to Art 5(h) of the Statute had occurred because all of the attacks had been directed against the Muslim civilian population because they were Muslims. The Trial Chamber addressed several additional attack scenarios beyond those explicitly referred to in the unlawful attack counts in determining whether or not the persecution count had been proven. In its discussion of incidents at three locations, Donja Veceriska, Gacice,and Grbavica, it held that the attacks were lawful although unlawful acts occurred after the attacks. Donja Veceriska and

Gacice were two villages in the municipality of Vitez, each with a mixed population of Muslims and Croats, facing from opposite sides the SPS weapons factory, one of the largest industrial complexes making explosives in Europe and a location of considerable strategic importance for both sides. The HVO had been in control of the SPS factory since late 1992. The HVO attacked Donja Veceriska on 16 April 1993 and Gacice on 20 April 1993. Concerning the attack on Donja Veceriska, although civilians were killed and civilian houses were burned during the attack, the Trial Chamber held:

> 543. [...] it was not able to characterise the attack as being targeted only against a Muslim civilian population. Consequently, until the Muslims' retreat on the morning of 18 April, the conflict at Donja Ceceriska was characterised as a conflict between the HVO and independent Croatian units on the one hand and the ABiH on the other. Before the retreat of the Muslims, it was not clear that the criteria of proportionality of a military attack against positions defended by the military had not been met as regards the destruction of property [...]
>
> 544. The Trial Chamber notes however that much of the destruction and damage occurred after the assaults on the villages were over and the HVO had taken control of the villages. [...] these events were large-scale destruction or devastation with no military necessity.

Concerning the attack on Gacice, the Trial Chamber held:

> 546. At 05:50 hours on 20 April, mortar fire started and shells fell. The village was pounded with shells from all sides and the attack came from three different directions. The HVO soldiers fired shots on the village from the SPS factory. In the village, there were only about thirty Muslim men with a few hunting rifles and a few bombs and grenades. The Muslims took refuge in a few houses. The men withdrew in the direction of the forest, whereas the women and children stayed in the cellars. After the shelling of the village, the Muslim inhabitants (therefore women and children for the most part) were encircled by soldiers wearing insignia such as those of the HVO, HV, U and Vitezovi. Some of the soldiers called the Muslims "balijas" and drove them out of their houses, which they then burned.
>
> 547. There were at least four Muslim deaths in the village.
>
> 548. The Defence contended that the village was defended by Muslim militia. The Trial Chamber heard little evidence to that effect. Even if that was the case, the torching of houses continued after the HVO soldiers and other units had taken control of the village.
>
> 549. Once the HVO soldiers had taken control of the village, they took the residents of Gacice (247 Muslim civilians) on a forced march towards Vitez. [...]
>
> 550. The Trial Chamber finds that these events amount to devastation without any military necessity and forcible transfers of civilians.

The village of Grbavica was 1.5 km from Stari Vitez, had a mixed Croat and Muslim population, and had strategic importance because occupation by the Bosnian army would permit it to block the HVO from access to a main road. The HVO attacked Grbavica on 7 September 1993 to seize control of the strategic location. Once Muslim combatants and Bosnian Muslim civilians were driven out of the village, Muslim houses were pillaged and burned. The Trial Chamber accepted that the attack itself was lawful but held:

> 557. The evidence showed that in fact only a few houses were occupied by soldiers. Moreover, it was clear that many houses were burned after the fighting, including, by definition, houses that were not legitimate targets. As far as the fires were concerned, they were not necessary from a military point of view [...]
>
> 559. The Trial Chamber favours the view expressed by the witnesses who maintained that the Bosnian Croats burned Muslim houses in order to dissuade Muslims from returning. Those acts of destruction were not justified by military necessity and acts of looting were committed.

Although the Trial Chamber appears to have regarded the incident at Loncari as occurring in an attack context, the village was occupied without resistance and then the inhabitants were detained, some were beaten, and homes and stables were torched (para. 567-568).

The Trial Chamber summarized the events which occurred in the municipality of Kiseljak as follows:

> 627. There is no doubt whatsoever that the attacks carried out by the HVO in April and June 1993 were not justified by strictly military reasons but also targeted Muslim civilians and their possessions.
>
> 629. Furthermore, the assets used by the Muslim soldiers to fight against these attacks were trivial compared to those used by the HVO. The HVO used heavy artillery and anti-tank artillery, 60, 80 and 120 mm mortars and hand-held grenade launchers (RPG7).
>
> 630. Finally, and more fundamentally, it is undeniable that military surveillance had been organized, particularly at Gomionica, Hercezi, Svinjarevo and Visnjica, and that the army of Bosnia-Herzegovina was present at the time of the offensives carried out in the village of Svinjarevo and especially Grahovci and Han Ploca. Those two villages were very close to the Serbian front lines and to the territories under the control of the ABiH. It follows however from the nature and the scale of the crimes perpetrated that the HVO soldiers were not fighting only in order to overcome that armed resistance. They were also seeking to make the Muslim civilian populations flee the municipality and to ensure that they did not return. In order to achieve this the HVO soldiers mainly acted as follows:
>
> – they terrorised the civilians by intensive shelling, murders and sheer violence;

- they systematically torched and destroyed their private homes and places of worship, usually after looting them;
- they slaughtered the livestock and seized agricultural reserves; and finally,
- they arrested and detained in camps, then finally exchanged or expelled Muslim civilians towards territories under the control of the army of Bosnia-Herzegovina.

The Trial Chamber clearly regarded the persecution count as more significant than the unlawful attack counts. Indeed, to a degree, the widespread and systematic attacks of cities, towns and villages inhabited by Bosnian Muslims as referred to in the descriptive paragraphs of the indictment related to the persecution count appeared to incorporate all of the elements one would envisage in an unlawful attack count plus an intent to discriminate against or target Bosnian Muslims as a group. Clearly, however, the Trial Chamber also endeavoured to distinguish between lawful and unlawful acts during an attack in lieu of uttering blanket condemnations. In particular, in its discussion of the attack on the village of Donja Veceriska, it accepted that proportional incidental or collateral casualties could occur during the course of a lawful attack against a legitimate military objective without an offence being committed.

5. CONCLUSION

Except for its discussion of individual criminal responsibility, the Blaškić judgment contains very little legal analysis. That is why this comment has referred so often to factual findings. Quite clearly the Trial Chamber was inclined to regard the crime against humanity charge of persecution as what one might regard as an all inclusive ethnic cleansing count into which one might scoop all objectionable conduct for which there was a discriminatory intent. In the Blaškić judgment, as the Trial Chamber concluded that the requisite discriminatory intent existed for all the instances in which unlawful attack charges were proven, the unlawful attacks appear to have been regarded, essentially, as a component of persecution. It is reasonable to assume other Trial Chambers will adopt a similar approach where indictments included both persecution and unlawful attack charges related to similar incidents. There are, however, indictments before the ICTY, the Galic case related to the siege of Sarajevo is an example, which include unlawful attack counts but no persecution counts.

Certain aspects of the decision are novel, in particular, the application of an assumption of risk concept in connection with the doctrine of command responsibility, the willingness to accept that indiscriminate or disproportionate attacks might also provide evidence of attacks essentially directed against civilians, the tendency to regard ad hoc ill equipped resistance to an attack as equivalent to no resistance, and the tendency to evaluate the lawfulness of an attack on the basis of what happened after the attack as well as during the attack. The Blaškić Trial Chamber was compelled to make the first major adjudication of conduct of hos-

tilities offences. The circumstances related to the adjudication were more reflective of low intensity conflict involving irregular forces on one side than of sustained conventional warfare and in such conflicts the line between the fighter or combatant and the civilian or bystander is particularly difficult to draw. Although one might hope for more analysis in future ICTY decisions, the instincts of the Trial Chamber appear to have been fundamentally sound.